DOCKET

No. 07-582

Title: Federal Communications Commission, et al., Petitioners

v.

Fox Television Stations, Inc., et al.

Docketed: November 1, 2007

Lower Ct: United States Court of Appeals for the Second Circuit

Case Nos.: (06-1760-ag, 06-2750-ag, 06-5358-ag)

Decision Date: June 4, 2007

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Aug 22 2007	Application (07A155) to extend the time to file a petition for a writ of certiorari from September 2, 2007 to October 4, 2007, submitted to Justice Ginsburg.
Aug 23 2007	Application (07A155) granted by Justice Ginsburg extending the time to file until October 4, 2007.
Sep 24 2007	Application (07A155) to extend further the time from October 4, 2007 to November 1, 2007, submitted to Justice Ginsburg.
Sep 24 2007	Application (07A155) granted by Justice Ginsburg extending the time to file until November 1, 2007.
Nov 1 2007	Petition for a writ of certiorari filed. (Response due December 3, 2007)
Nov 20 2007	Order extending time to file response to petition to and including January 2, 2008, for all respondents.
Dec 17 2007	Order further extending time to file response to petition to and including February 1, 2008, for all respondents.
Feb 1 2008	Brief of respondents NBC Universal, Inc., and NBC Telemundo License Company in opposition filed.
Feb 1 2008	Brief of respondents Fox Television Stations, Inc., CBS Broadcasting Inc., and ABC, Inc. in opposition filed.
Feb 13 2008	DISTRIBUTED for Conference of February 29, 2008.
Feb 15 2008	Reply of petitioners Federal Communications Commission, et al. filed. (Distributed)
Mar 10 2008	DISTRIBUTED for Conference of March 14, 2008.
Mar 17 2008	Petition GRANTED.
Apr 10 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including June 2, 2008.
Apr 22 2008	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for respondents, NBC Universal, Inc.,and NBC Telemundo License Company.
Jun 2 2008	Joint appendix filed.
Jun 2 2008	Brief of petitioners Federal Communications Commission, et al. filed.

Jun 3 2008	Brief amicus curiae of Decency Enforcement Center for Telvision filed.
Jun 6 2008	Brief amicus curiae of National Religious Broadcasters filed.
Jun 6 2008	Brief amicus curiae of Morality in Media, Inc. filed.
Jun 9 2008	Brief amici curiae of Alliance Defense Fund and Family Research Council filed.
Jun 9 2008	Brief amicus curiae of Parents Television Council filed.
Jun 9 2008	Brief amici curiae of American Center for Law & Justice, et al. filed.
Jun 9 2008	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Jun 9 2008	Brief amici curiae of Free Press, et al.in support of neither party filed.
Jun 9 2008	Brief amici curiae of American Academy of Pediatrics, et al. filed.
Jun 20 2008	The time to file respondents' briefs on the merits is extended to and including August 1, 2008.
Jul 31 2008	CIRCULATED
Aug 1 2008	Brief of respondents NBC Universal, Inc., and NBC Telemundo License Company filed. (Distributed)
Aug 1 2008	Brief of respondent Center for Creative Voices in Media filed. (Distributed)
Aug 1 2008	Brief of respondent Fox Television Stations, Inc. filed. (Distributed).
Aug 6 2008	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for respondent ABC, Inc.
Aug 8 2008	Brief amici curiae of National Assocation of Broadcasters and Radio-Television News Directors filed. (Distributed)
Aug 8 2008	Brief amicus curiae of Time Warner Inc. filed. (Distributed)
Aug 8 2008	Brief amici curiae of Public Broadcasters filed. (Distributed)
Aug 8 2008	Brief amici curiae of Jefferson Center for the Protection of Free Expression and the Media Institute filed. (Distributed)
Aug 8 2008	Brief amici curiae of California Broadcasters Association, et al. filed. (Distributed)
Aug 8 2008	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Aug 8 2008	Brief amicus curiae of ABC Television Affiliates Association filed. (Distributed)
Aug 8 2008	Brief amici curiae of Former FCC Commissioners and Officials filed. (Distributed)
Aug 18 2008	SET FOR ARGUMENT ON Tuesday, November 4, 2008.
Aug 20 2008	Brief amici curiae of Center for Democracy & Technology, et al. filed. (Distributed).
Aug 26 2008	Record received from U.S.C.A. for the 2nd Circuit. (1 box)
Sep 2 2008	Reply of petitioners Federal Communications Commission, et al. filed. (Distributed)
Nov 4 2008	Argued. For petitioners: Gregory G. Garre, Solicitor General, Department

of Justice, Washington, D.C. For respondents: Carter G. Phillips, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

Respondents who were petitioners in the court of appeals below are Fox Television Stations, Inc.; CBS Broadcasting Inc.; WLS Television, Inc.; KTRK Television, Inc.; KMBC Hearst-Argyle Television, Inc.; and ABC Inc.

Respondents who were intervenors in the court of appeals below are NBC Universal, Inc.; NBC Telemundo License Co.; NBC Television Affiliates; FBC Television Affiliates Association; CBS Television Network Affiliates; Center for the Creative Community, Inc., doing business as Center for Creative Voices in Media, Inc.; and ABC Television Affiliates Association.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Communications Commission and the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-60a) is reported at 489 F.3d 444. The order of the Federal Communications Commission (App., *infra*, 61a-142a) is reported at 21 F.C.C.R. 13,299.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 143a-144a) was entered on June 4, 2007. On August 23, 2007, Justice Ginsburg extended the time within which

to file a petition for a writ of certiorari to and including October 4, 2007, and on September 24, 2007, Justice Ginsburg further extended the time to and including November 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions are set out in an appendix to this petition. App., *infra*, 145a-148a.

STATEMENT

1. a. Under 18 U.S.C. 1464, it is unlawful to "utter[] any obscene, indecent, or profane language by means of radio communication." As directed by Congress, the Federal Communications Commission (FCC or Commission) has adopted regulations specifying that the indecency prohibition applies to radio and television broadcasts aired between the hours of 6 a.m. and 10 p.m. 47 C.F.R. 73.3999(b) (adopted pursuant to Public Telecommunications Act of 1992 § 16(a), Pub. L. No. 102-356, 106 Stat. 954); see *Action for Children's Television* v. *FCC*, 58 F.3d 654, 669-670 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996). The Commission does not regulate indecent broadcasts outside that time period. The FCC has authority to enforce the indecency prohibition by, among other things, imposing civil forfeitures, see 47 U.S.C. 503(b)(1)(B) and (D), or taking violations into account during license-renewal proceedings, see 47 U.S.C. 307, 309(k).

b. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*), this Court upheld the constitutionality of the FCC's authority to regulate indecent broadcasts. At issue in *Pacifica* was the midday radio broadcast of George Carlin's monologue "Filthy Words." Responding to a listener complaint, the Commission determined that

the broadcast violated Section 1464. In reaching that conclusion, it applied a "concept of 'indecent' [that] is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at 731-732 (quoting *In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y.*, 56 F.C.C.2d 94, 98 (Feb. 12, 1975)). Under that definition, the Court explained, "context is all-important." *Id.* at 750.

In rejecting a constitutional challenge to the Commission's enforcement of Section 1464, the Court observed that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" in that "material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748. The Court further observed that, because "broadcasting is uniquely accessible to children," indecent language can "enlarge[] a child's vocabulary in an instant." *Id.* at 749. The Court concluded that "the government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household justified the regulation of otherwise protected expression." *Ibid.* (internal quotation marks and citation omitted); see *id.* at 762 (Powell, J., concurring). The Court rejected the contention that "one may avoid further offense by turning off the radio when he hears indecent language," comparing it to

"saying that the remedy for an assault is to run away after the first blow." *Id.* at 748-749.

c. In subsequent orders, the Commission sought to describe the circumstances under which non-repetitive utterances of offensive sexual or excretory terms would violate Section 1464. By 1987, the Commission had determined that when "a complaint focuses solely on the use of expletives, * * * repetitive use in a patently offensive manner is a requisite to a finding of indecency." *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (Apr. 16, 1987). In contrast, when offensive language "goes beyond the use of expletives" and involves "the description or depiction of sexual or excretory functions," "repetition of specific words or phrases is not necessarily an element critical to a determination of indecency." *Ibid.*

The Commission further explained the indecency standard in a 2001 policy statement. See *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 7999 ¶ 1 (Mar. 14, 2001) (*Industry Guidance*). That statement set out a two-part test for indecency. First, the material at issue "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Id.* at 8002 ¶ 7. Second, "the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8.

The policy statement explained that whether a broadcast is "patently offensive" turns on the "*full context*" in which the material was broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9. Three "principal factors" are

"significant": "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Id.* at 8003 ¶ 10 (emphases omitted). With respect to the second factor, the policy statement noted that "[r]epetition of and persistent focus on sexual or excretory material" may "exacerbate the potential offensiveness of broadcasts," but "even relatively fleeting references may be found indecent where other factors"—such as the use of "graphic or explicit" language—"contribute to a finding of patent offensiveness." *Id.* at 8008-8009 ¶¶ 17, 19.

d. In January 2003, the NBC network aired a live broadcast of the Golden Globe Awards. In accepting the award for Best Original Song, the rock singer Bono stated: "This is really, really fucking brilliant. Really, really great." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (Mar. 18, 2004) (*Golden Globe Awards Order*). The Commission concluded that the broadcast of Bono's remark was indecent even though Bono's use of the F-Word was not "sustained or repeated." *Id.* at 4980 ¶ 12.[1] The Commission explained that, even when used

[1] The FCC's Enforcement Bureau had initially ruled that the broadcast was not indecent because Bono "used the word 'fucking' as an adjective or expletive to emphasize an exclamation," and because the remarks were "fleeting and isolated." See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden*

as an "intensifier," the F-Word falls within the subject-matter scope of indecency regulation because, given its "core meaning," the word "inherently has a sexual connotation." *Id.* at 4978 ¶ 8. The Commission also found that Bono's remark was "patently offensive" because "[t]he 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language"; its use "invariably invokes a coarse sexual image"; and its broadcast "on a nationally telecast awards ceremony[] was shocking and gratuitous." *Id.* at 4979 ¶ 9. The Commission observed that NBC had not claimed that its broadcast of the word had "any political, scientific or other independent value." *Ibid.*

Although the Commission concluded that Bono's remark was indecent, it did not impose a sanction. Because "prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent," the Commission determined that NBC "did not have the requisite notice to justify a penalty." *Golden Globe Awards Order*, 19 F.C.C.R. at 4980-4982 ¶¶ 12, 15.

2. This case arises out of two broadcasts that aired before the Commission released the *Golden Globe Awards Order*. On December 9, 2002, the Fox television network broadcast the 2002 Billboard Music Awards beginning at 8 p.m. eastern standard time. During that broadcast, the entertainer Cher received an "Artist Achievement Award." In her acceptance speech, she said:

> I've had unbelievable support in my life and I've worked really hard. I've had great people to work

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Globe Awards" Program, 18 F.C.C.R. 19,859, 19,861 ¶¶ 5-6 (Oct. 3, 2003). The *Golden Globe Awards Order* reversed that staff decision.

> with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't.

App., *infra*, 115a-116a.

The following year, on December 10, 2003, Fox broadcast the 2003 Billboard Music Awards beginning at 8 p.m. eastern standard time. Nicole Richie and Paris Hilton, the stars of Fox's show "The Simple Life," presented one of the awards. During their presentation, they engaged in the following exchange:

> Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
>
> Nicole Richie: Okay, God.
>
> Paris Hilton: It feels so good to be standing here tonight.
>
> Nicole Richie: Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.

App., *infra*, 69a-71a.

a. The Commission received complaints from viewers about both Billboard Music Awards broadcasts. It addressed those and other complaints in an order intended to provide "guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2665 ¶ 2 (Feb. 21, 2006) (*Omnibus Order*). As relevant here, the *Omnibus Order* addressed the 2002 and

2003 Billboard Music Awards, as well as two other programs: (1) several "NYPD Blue" episodes aired by the ABC network in which, among other things, a character on the show used the term "bullshit," and (2) an episode of CBS's "The Early Show" in which a contestant on CBS's "Survivor: Vanuatu" referred to another contestant as a "bullshitter" in a live interview. *Id.* at 2690-2700 ¶¶ 100-145.

In the *Omnibus Order*, the Commission concluded that each of those four programs contained indecent language in violation of Section 1464 and the Commission's indecency regulations. 21 F.C.C.R. at 2690 ¶ 24. As in the *Golden Globe Awards Order*, however, the Commission did not impose any sanction because it concluded that broadcast licensees lacked adequate notice of its new policy regarding the airing of expletives. *Ibid.*; see *id.* at 2700 ¶ 145.

b. Respondents sought review of the *Omnibus Order*, and the cases were consolidated in the United States Court of Appeals for the Second Circuit. App., *infra*, 66a. At the Commission's request, the court of appeals granted a remand in order to provide the agency an opportunity to address in the first instance the broadcasters' specific challenges to the Commission's determinations with regard to their programs. *Id.* at 67a-68a.

c. On remand, the Commission vacated the relevant portions of the *Omnibus Order*. App., *infra*, 68a. It dismissed the complaints against "NYPD Blue" on procedural grounds, *id.* at 129a-131a, and it concluded that the use of the term "bullshitter" on "The Early Show" was not indecent because it occurred in the context of a "news interview," *id.* at 125a-128a.

At the same time, the Commission reaffirmed its conclusion that the broadcast of the 2002 and 2003 Billboard

Music Awards violated the prohibitions against the broadcast of indecent material. App., *infra*, 69a-142a. Applying the framework set out in the 2001 *Industry Guidance*, the Commission concluded that the expletives aired during the Billboard Music Awards were sexual or excretory references that fell within the subject-matter scope of the indecency definition. Fox did not dispute that Richie's use of the S-Word referred to excrement. *Id.* at 73a. In addition, the Commission reaffirmed that the "F-Word" (used by both Richie and Cher) inherently "has a sexual connotation even if the word is not used literally" because "the word's power to 'intensify' and offend derives from its implicit sexual meaning." *Id.* at 73a-74a; see *id.* at 117a-118a. The Commission also concluded that both broadcasts were "patently offensive." *Id.* at 74a, 118a. With respect to both broadcasts, the Commission found that the language used was not only graphic and shocking—particularly in the context of nationally televised awards programs viewed by a substantial number of children—but was also gratuitous. *Id.* at 75a-76a, 118a-120a. Indeed, the Commission noted, Fox did not argue that the expletives at issue "had any artistic merit or were necessary to convey any message." *Id.* at 76a n.44; see *id.* at 120a n.191.

The Commission also rejected the argument that the isolated nature of the utterances should preclude a finding that the language was indecent. App., *infra*, 82a-83a. The Commission explained that it was "artificial" to maintain a distinction between "expletives," which had to be repeated to be actionable, and literal "descriptions or depictions of sexual or excretory functions," which did not. *Id.* at 82a. As the Commission observed, "[i]n evaluating whether material is patently offensive, the Commission's approach has generally been to exam-

ine all factors relevant to that determination." *Id.* at 83a. The Commission accordingly found that "categorically requiring repeated use of expletives in order to find material indecent" would be "inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." *Ibid.* The Commission noted that *Pacifica* did not require it to "ignore 'the first blow' to the television audience in the circumstances presented here." *Ibid.* The Commission also observed that "granting an automatic exemption for 'isolated or fleeting' expletives" would allow broadcasters "to air any one of a number of offensive sexual or excretory words, regardless of context, with impunity during the middle of the afternoon provided they did not air more than one expletive in any program segment." *Id.* at 84a-85a. Permitting "[s]uch a result," the Commission explained, "would be inconsistent with [the] obligation to enforce the law responsibly." *Id.* at 85a.

3. A divided panel of the court of appeals vacated and remanded. App., *infra*, 1a-60a.

a. The court of appeals concluded that the Commission's policy regarding isolated expletives was "arbitrary and capricious under the Administrative Procedure Act" because the Commission had "failed to articulate a reasoned basis for [its] change in policy." App., *infra*, 2a. Taking the view that the "primary reason for the crackdown on fleeting expletives" was to protect "viewers (including children)" from the "first blow" of an expletive, the court of appeals stated that the Commission had failed to provide a "reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." *Id.* at 25a. The court faulted the Commission for failing to produce

"any evidence that suggests a fleeting expletive is harmful," much less that any such harm was "serious enough to warrant government regulation." *Id.* at 32a.

Even "[m]ore problematic," according to the court of appeals, was the fact that "the Commission does not take the position that *any* occurrence of an expletive is indecent or profane under its rules." App., *infra*, 25a - 26a. Because the Commission did not flatly prohibit the broadcast of vulgar expletives in every circumstance, the court concluded that "the record simply does not support the position that the Commission's new policy was based on its concern with the public's mere exposure to this language on the airwaves." *Id.* at 27a-28a. Even though the court recognized that, under *Pacifica*, any "per se ban would likely raise constitutional questions above and beyond the concerns raised by the [Commission's] current policy," *id.* at 26a n.7, the court nonetheless believed that it was arbitrary for the Commission to prohibit isolated expletives only in circumstances where their utterance would be patently offensive.[2]

The court of appeals also took issue with the Commission's determination that an expletive such as the F-

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[2] The court also invalidated the Commission's conclusion that non-repeated expletives could be "profane." App., *infra*, 33a-34a. In the *Golden Globe Awards Order*, the FCC had held that Bono's use of the F-Word was "profane" within the meaning of Section 1464; in doing so, it rejected an interpretation of "profane" that was limited to blasphemous utterances, instead construing the term to mean "language * * * so grossly offensive to members of the public who actually hear it as to amount to a nuisance." 19 F.C.C.R. at 4981 ¶ 13. The court stated that the Commission had failed to provide any "explanation of what harm this separate enforcement against profane speech addresses that is not already addressed by the FCC's indecency and obscenity enforcement." App., *infra*, 34a.

Word has an inescapably sexual connotation. The court stated that "[t]his defies any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any 'sexual or excretory' meaning." App., *infra*, 29a. In addition, the court dismissed as "divorced from reality" the Commission's concern that a "per se exemption for fleeting expletives would 'permit broadcasters to air expletives at all hours of the day so long as they did so one at a time.'" *Id.* at 30a (citation omitted).

Although the court of appeals "refrain[ed] from deciding the various constitutional challenges to the Remand Order raised by the Networks," it made certain "observations" regarding the constitutionality of the Commission's broadcast indecency policies. App., *infra*, 35a. The court "question[ed] whether the FCC's indecency test can survive First Amendment scrutiny," *ibid.*, and it expressed doubt "that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the Networks," *id.* at 45a.

b. Judge Leval dissented. App., *infra*, 46a-60a. In his view, the Commission had provided a "sensible" reason for its "relatively modest change of standard." *Id.* at 49a. "[T]he Commission's central explanation for the change was essentially its perception that the 'F-Word' is not only of extreme and graphic vulgarity, but also conveys an inescapably sexual connotation." *Ibid.* The FCC therefore "concluded that the use" of that expletive, "even in a single fleeting instance without repetition," was "likely to constitute an offense to the decency standards of § 1464." *Id* at 50a. "In other words," Judge Leval stated, "the Commission found, contrary to

its earlier policy, that the word is of such graphic explicitness in inevitable reference to sexual activity that absence of repetition does not save it from violating the standard of decency." *Id.* at 52a.

Unlike the majority, Judge Leval was not troubled by the Commission's decision not to "follow an all-or nothing policy." App., *infra*, 53a. Instead, he explained that the Commission "attempt[ed] to draw context-based distinctions, with the result that no violation will be found in circumstances where usage is considered sufficiently justified that it does not constitute indecency." *Ibid.* Far from an example of "irrationality," Judge Leval stated, the policy "is an attempt on the part of the Commission over the years to reconcile conflicting values through standards which take account of context." *Id.* at 54a-55a. As Judge Leval explained, the Commission's context-driven approach "is in no way a consequence of the Commission's change of standard for fleeting expletives. It applies across the board to all circumstances." *Id.* at 53a. Thus, the "majority's criticism of inconsistency is not properly directed against the change of standard here in question," which "[i]f anything * * * has made the Commission more consistent rather than less" by ensuring that "the same context-based factors will apply to all circumstances." *Id.* at 54a.

REASONS FOR GRANTING THE PETITION

In vacating the FCC's order, the court of appeals adopted an analysis that directly conflicts with the approach toward broadcast-indecency regulation that this Court mandated in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). The court of appeals criticized the Commission for taking context into account and refusing to

treat a single use of an expletive, no matter how graphic or gratuitous, as per se not indecent, even though, in *Pacifica*, this Court emphasized that "context is all-important" in evaluating indecency. *Id.* at 750. Indeed, while the court of appeals faulted the Commission for not having the courage of its convictions and treating expletives as per se indecent, it also recognized that in light of *Pacifica*'s focus on context, a blanket prohibition on all uses of particular words would almost certainly violate the First Amendment. App., *infra*, 26a n.7. By faulting the Commission for exercising the contextual judgment that *Pacifica* mandated, the court of appeals appears to have put the FCC to a choice between allowing one free use of any expletive no matter how graphic or gratuitous, or else adopting a (likely unconstitutional) across-the-board prohibition against expletives. There is no reason that the Commission must choose between those per se rules.

The decision of the court of appeals is also inconsistent with settled principles governing judicial review of agency action. The court asserted that the Commission had not adequately explained why it reversed its policy of categorically exempting isolated expletives from the federal restrictions on indecent broadcasts. In reality, the Commission provided a thorough, reasoned explanation for its change in policy. Under the deferential standard of review required by the Administrative Procedure Act (APA), 5 U.S.C. 501 *et seq.*, the Commission's judgment as to how best to enforce the federal prohibition on the broadcast of indecent material should have been upheld, and the court's contrary conclusion was erroneous. And the court's determination that the FCC was required to provide "record evidence" showing that expletives are harmful is in direct conflict with a holding

of the D.C. Circuit. See *Action for Children's Television* v. *FCC*, 58 F.3d 654, 662 (1995) (en banc), cert. denied, 516 U.S. 1043 (1996).

In most cases, a remand to an agency for a fuller explanation of a policy would not merit this Court's review. Here, however, the court of appeals candidly acknowledged that, under its decision, the Commission probably will be unable to "adequately respond to the constitutional and statutory challenges" in this case even by "proffering a reasoned analysis for its new approach to indecency." App., *infra*, 45a. The court has thus sent the Commission back to run a Sisyphean errand while effectively invalidating much of the Commission's authority to enforce 18 U.S.C. 1464. In the meantime, the Commission is left in the untenable position of having a grant of authority that the public expects it to exercise, and that *Pacifica* allows it to exercise, but that the Second Circuit has indicated cannot be meaningfully exercised consistently with that court's view of the APA and the First Amendment. Accordingly, this Court's review is warranted.

A. The Decision Below Conflicts With This Court's Decision In *Pacifica*

The reasoning of the court of appeals conflicts directly with the context-driven approach governing broadcast indecency that this Court upheld in *Pacifica*. In its analysis of the FCC's policy, the court of appeals focused on the Commission's statement, picking up on *Pacifica*, that it sought to protect broadcast audiences from the "first blow" resulting from the single utterance of an expletive. App., *infra*, 84a. The court rejected that rationale based on its view that "the 'first blow' theory bears no rational connection to the Commission's

actual policy regarding fleeting expletives" because "the Commission does not take the position that *any* occurrence of an expletive" is indecent. *Id.* at 26a. Thus, the court emphasized that the broadcast of a vulgar expletive on "The Early Show" was found not to be indecent because it took place in the context of a "news interview," and that the expletives in "Saving Private Ryan" did not make the broadcast of that movie indecent because, among other reasons, deleting the expletives "would have * * * diminished the power, realism and immediacy of the film experience for viewers." *Id.* at 26a-27a (quoting *id.* at 128a, and *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4513 ¶ 14 (Feb. 3, 2005) (*Saving Private Ryan Order*)). According to the court, those outcomes demonstrated that "the Commission's new policy was [not] based on its concern with the public's mere exposure to this language on the airwaves." *Id.* at 27a-28a. But just because the "first blow" theory is relevant does not mean that the Commission must ignore context and treat any first blow as a knockout punch.

Contrary to the reasoning of the court of appeals, the Commission's consideration of context is appropriate for three reasons. First, the context in which a word is used is highly relevant in determining whether the word is offensive. Judge Leval illustrated the point well when he observed that the judges of the court of appeals had used the F-Word at oral argument: "Had the case been on another subject, such usage would surely have seemed inappropriate. Because of the issues in this case, the word was central to the issues being discussed. It is not irrational to take context into account to determine

whether use of the word is indecent." App., *infra*, 54a n.16.

Second, when offensive language is used in certain contexts—such as a news program—countervailing First Amendment interests may be at stake, making it appropriate for the Commission to "proceed with the utmost restraint." App., *infra*, 127a. Agencies are not required to pursue their policies in complete disregard of competing interests, nor are they prohibited from recognizing that those interests may be greater in some contexts than in others. *Id.* at 55a (Leval, J., dissenting) (FCC has properly "reconcile[d] competing values through standards which take account of context."); see *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 809-811 (1978); cf. *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837, 865-866 (1984).

Third, and most importantly, the court of appeals' hostility to a contextual analysis is, at bottom, an attack on this Court's decision in *Pacifica*. In *Pacifica*, the Court upheld the Commission's authority to regulate broadcast indecency precisely because "[t]he Commission's decision rested entirely on a nuisance rationale in which context is all-important." 438 U.S. at 750; see *ibid.* (indecency determination "requires consideration of a host of variables"). "[A] nuisance," the Court observed, "may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Ibid.* (quoting *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

As Justice Stevens explained, "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context." *Pacifica*, 438 U.S. at 747 (plurality opinion). Instead, "[i]t is a characteristic

of speech such as this that both its capacity to offend, and its 'social value' * * * vary with the circumstances"; thus, "[w]ords that are commonplace in one setting are shocking in another." *Ibid.* "Because content of that character is not entitled to absolute constitutional protection under all circumstances," Justice Stevens wrote, "we must consider its context in order to determine whether the Commission's action was constitutionally permissible." *Id.* at 747-748; see *id.* at 742 ("indecency is largely a function of context" and "cannot be adequately judged in the abstract"); *id.* at 761 (Powell, J., concurring) (agreeing that "*on the facts of this case*, the Commission's order did not violate respondent's First Amendment rights") (emphasis added). In short, the FCC's contextual analysis was crucial to this Court's endorsement of the Commission's determination in *Pacifica*.

According to the court of appeals, a contextual approach to isolated expletives bears "no rational connection" to the goal of protecting broadcast audiences from the "first blow." App., *infra*, 26a. But there is no inherent tension between a "first blow" theory and a consideration of context. Indeed, it was this Court in *Pacifica* that first analogized the broadcast of indecent language to the "first blow" of an assault, 438 U.S. at 748-749, even as it recognized a page later that the same language in a different context—*e.g.*, "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy," *id.* at 750—might not be legally indecent. Moreover, in the discussion of Paul Cohen's famous jacket, see *id.* at 747 n.25, 749, Justice Stevens made clear that context could matter in analyzing a single use of an expletive. See also *id.* at 750 n.29.

Consistent with *Pacifica*, the Commission in this case reasonably concluded that Cher's and Richie's remarks constituted a "first blow" that could be redressed, not only because of the words that were used but also because of the context in which they were uttered: The language was vulgar and graphic; the words were uttered without any warning to parents during a live, nationally broadcast awards program watched by millions of children, App., *infra*, 76a, 119a; and it was undisputed that Cher's and Richie's remarks were gratuitous and unjustified by any artistic purpose, *id.* at 76a n.44, 120a n.191. Nothing in the Administrative Procedure Act required the Commission to prohibit the use of the same words in all other contexts in order to reach the reasonable conclusion that Cher's and Richie's comments were indecent as broadcast. While the court of appeals believed that consideration of countervailing First Amendment interests on a case-by-case basis undermined the reasonableness of the Commission's decision to abandon the per se exemption for isolated expletives, the court's position cannot be reconciled with *Pacifica*. Once it is recognized that (1) a particularly graphic utterance can serve as a first blow that can cause immediate damage, and (2) context matters, it follows logically that there is no mandate for a per se rule of either prohibition or license.

B. The Decision Below Is Inconsistent With Settled Principles Of Administrative Law And Conflicts With A Decision Of The D.C. Circuit

The court of appeals gave several additional reasons for its conclusion that "the FCC has failed to articulate a reasoned basis for [its] change in policy" regarding isolated expletives. App., *infra*, 2a. None withstands

scrutiny, and one is in direct conflict with a decision of the D.C. Circuit.

1. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under that standard, "if the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.'" *NCTA* v. *Brand X Internet Servs.*, 545 U.S. 967, 981-982 (2005) (quoting *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)).

The Commission here gave a reasonable explanation for reaffirming its determination, first made in the *Golden Globe Awards Order*, that the "mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." App., *infra*, 82a (quoting *Golden Globe Awards Order*, 19 F.C.C.R. at 4980 ¶ 12). The Commission explained that, "[i]n evaluating whether material is patently offensive, [its] approach has generally been to examine all factors relevant to that determination." *Id.* at 83a. Accordingly, the Commission reasoned, to "suggest[] that one of these factors—whether material had been repeated—would always be decisive in a certain category of cases" would be "at odds with the Commission's overall enforcement policy." *Ibid.* As Judge Leval explained, the *Golden Globe Awards Order* eliminated the "nearly automatic pass" that the Commission had previously given to isolated expletives, and recognized that a brief sexual or excretory reference could be

patently offensive if uttered in certain contexts. *Id.* at 49a; see 19 F.C.C.R. at 4980 ¶ 12. That change in policy "made the Commission more consistent rather than less, because under the new rule, the same context-based factors will apply to all circumstances." App., *infra*, 54a. The panel majority's refusal to accept the Commission's reasoned and reasonable explanation for its change of policy is inconsistent with the deferential standard mandated by *State Farm*.

2. The court of appeals refused to defer to the Commission's justifications for its policy because, in the court's view, the Commission was required to explain "why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." App., *infra*, 25a; see *id.* at 32a ("The agency asserts the same interest in protecting children as it asserted thirty years ago, but until the *Golden Globes* decision, it had never banned fleeting expletives."). In this regard, the court repeatedly insisted that the agency should have provided "record evidence" to support its changed view of the broadcast of single expletives. *Id.* at 29a n.10; see *id* at 29a n.11, 32a. The hurdles that the court of appeals erected to the Commission's ability to make a change in policy find no support in the Administrative Procedure Act.[3]

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[3] The court of appeals found it significant that broadcasters had relied on the exemption that the Commission had provided for isolated expletives. App., *infra*, 2a, 32a. The Commission, however, has consistently declined to sanction broadcasters for isolated expletives that were aired before the Commission announced its revised policy in the *Golden Globe Awards Order*. Accordingly, the Commission's change in policy does not undermine any reliance interests.

The court of appeals failed to appreciate that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances," *State Farm*, 463 U.S. at 57 (quoting *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)). Thus, an agency has an obligation to reconsider "the wisdom of its policy on a continuing basis" and may make adjustments, whether "in response to changed factual circumstances, or a change in administrations." *Brand X*, 545 U.S. at 981 (citation omitted). And an agency may rationally alter its policy for the straightforward reason that its "prior policy failed to implement properly the statute." *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991).

Here, the Commission explained that its prior policy on isolated expletives had "failed to implement" Section 1464 properly, *Rust*, 500 U.S. at 173, because it rested on an "artificial" distinction between "expletives" and "descriptions or depictions of sexual or excretory activity" that ignored the fact that "an expletive's power to offend derives from its sexual or excretory meaning." App., *infra*, 82a-83a (internal quotation marks and citation omitted). The Commission also explained that treating isolated expletives as automatically permissible in every circumstance was inconsistent with the "critical nature of context" in evaluating whether a sexual or excretory reference is "patently offensive." *Id.* at 83a.

The court of appeals, however, believed that the Commission was required to adduce "evidence that suggests a fleeting expletive is harmful," and that "this harm is serious enough to warrant government regulation." App., *infra*, 32a. That argument is inconsistent with *Pacifica*, in which this Court upheld the Commission's indecency determination even though there was

no record evidence of any harm caused by the Carlin monologue. Instead, the Court found a sufficient basis for regulation in the commonsense observation that "broadcasting is uniquely accessible to children, even those too young to read," and that written messages "incomprehensible to a first grader," when broadcast, can "enlarge[] a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 749.

In addition, the reasoning of the court of appeals is in direct conflict with that of the D.C. Circuit in *Action for Children's Television* v. *FCC*, 58 F.3d 654 (1995) (en banc), cert. denied, 516 U.S. 1043 (1996). That decision affirmed the Commission's authority to regulate broadcast indecency, holding that the government has an interest in protecting children from material that would have an adverse impact on their "ethical and moral development." *Id.* at 662. The court explained that "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity." *Ibid.* To the contrary, "the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech." *Id.* at 661-662; cf. *Ginsberg* v. *New York*, 390 U.S. 629, 641 (1968) (upholding statute prohibiting sale of material obscene as to minors, even though the harmfulness of such material was not "an accepted scientific fact"). Here, the applicable statute prohibits the broadcast of "any obscene, indecent, or profane language." 18 U.S.C. 1464. Section 1464 does not require the Commission to show that the

language to which it applies is otherwise harmful; harm has already been presumed by Congress.

3. The court of appeals also took issue with the Commission's conclusion that "*in certain cases*, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions," App., *infra*, 83a (emphasis added), because, in the court's view, "the general public well knows" that offensive sexual or excretory words "are often used in everyday conversation without any 'sexual or excretory' meaning," *id.* at 29a. But the Commission made that statement in the context of its broader observation that "an expletive's power to offend derives from its sexual or excretory meaning." *Id.* at 83a (internal quotation marks omitted). Moreover, Cher's reference to her critics is an example of a use of an expletive in a way that at a minimum draws force from its sexual or excretory origins, even if she was not literally "suggesting that people engage in sexual activities" with her critics. *Id.* at 120a; see *id.* at 58a (Leval, J., dissenting) ("It is surely not irrational for the Commission to conclude that * * * the F-Word is never completely free of an offensive, sexual connotation"). The court deemed the Commission's conclusion unsupported by "record evidence," *id.* at 30a n.10, but that assessment overlooks the evidence cited in the order, *id.* at 74a & nn.39-40. Moreover, the court's analysis is inconsistent with *Pacifica*, in which the Court upheld the Commission's conclusion that the Carlin monologue "depicted sexual and excretory activities," 438 U.S. at 732, even though one of Carlin's principal themes was that many of the expletives he used had non-literal meanings, see, *e.g.*, *id.* at 754.

4. Finally, the court of appeals exceeded the proper scope of its review when it concluded that the Commission had not shown that its revised policy was necessary. The Commission had observed that a blanket exemption for isolated expletives "would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time," App., *infra*, 84a-85a—a result that would seriously undermine the objectives of Section 1464. But the court asserted that "broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes*," and it suggested that the prediction that they might do so was "both unsupported by any evidence and directly contradicted by prior experience." *Id.* at 30a & n.11.

As an initial matter, the Commission's point was less a prediction than a consideration of the logic of providing a per se exemption for isolated expletives. A policymaker is well-served to consider where the logic of an argument would extend, even if the regulated community might exercise self-restraint in the short run.

In any event, there is substantial support for the notion that the failure to regulate "isolated and gratuitous uses of [vulgar] language on broadcasts when children were expected to be in the audience * * * would likely lead to more widespread use of the offensive language." *Golden Globe Awards Order*, 19 F.C.C.R. at 4979 ¶ 9.[4]

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[4] In the *Golden Globe Awards Order*, the Commission cited an academic study that found that "offensive" language had increased significantly on broadcast television between 1990 and 2001. 19 F.C.C.R. at 4979 ¶ 9 n.26; see Barbara K. Kaye and Barry S. Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, 7 J. Mass Commc'n & Soc'y 429, 441 (2004) (finding that "offensive" language was used 98 times on major broadcast networks between 8 and 9 p.m. in 1990, but 216 times on the same networks during the same hour in 2001).

As Judge Leval explained, there was "good reason to expect that a marked increase" in the broadcast of expletives "would occur if the old policy were continued." App., *infra*, 57a. The court erred in "substitut[ing] its judgment for that of the agency," *State Farm*, 463 U.S. at 43, and its decision is in tension with decisions of the D.C. Circuit recognizing that "[p]redictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies." *Public Citizen, Inc.* v. *NHTSA*, 374 F.3d 1251, 1260-1261 (1994); see *American Gas Ass'n* v. *FERC*, 428 F.3d 255, 264 (2005) ("[I]t is within the scope of the agency's expertise to make . . . a prediction about the market it regulates, and a reasonable prediction deserves our deference.") (brackets in original).

C. The Question Presented Is Important And Warrants This Court's Review

On its face, the decision of the court of appeals does nothing more than remand the case to the FCC to provide a new explanation for its change in policy. App., *infra*, 45a. In an ordinary case, such a decision would not merit this Court's review. Here, however, the Commission has already fully explained its policy, and the opinion of the court of appeals makes clear that the Commission is unlikely to be able to say anything on remand that the court would deem satisfactory to justify that policy. On the one hand, the court of appeals found the Commission's regulation of isolated expletives unjustified because it takes account of context, rather than adopting a per se rule of prohibition. On the other hand, the alternative—a flat ban on any use of expletives, regardless of context—would almost certainly violate the

First Amendment. See *Pacifica*, 438 U.S. at 746 (plurality opinion) ("Some uses of even the most offensive words are unquestionably protected."). Indeed, the court of appeals recognized that "a per se ban would likely raise constitutional questions above and beyond the concerns raised by the current policy." App., *infra*, 26a n.7. Having established those parameters for the remand, it is no wonder that the court predicted that the FCC would be unable to "adequately respond to the constitutional and statutory challenges" in this case even by "proffering a reasoned analysis for its new approach to indecency." App., *infra*, 45a. As a result, the court's decision has an immediate and significant effect that warrants review.

Nor can the consequences of the decision below be confined to the FCC's disposition of the complaints regarding the 2002 and 2003 Billboard Music Awards programs. Rather, the decision effectively reinstitutes an automatic per se exemption for the broadcast of isolated expletives—an exemption that the Commission has expressly disavowed as inconsistent with its obligation to enforce responsibly the prohibition on broadcast indecency. Indeed, the decision calls into serious question the Commission's authority to regulate even *repeated* uses of offensive sexual or excretory language. In disagreeing with the Commission's treatment of "non-literal" uses of expletives such as the "F-Word," the court of appeals opined that such expletives "are often used in everyday conversation without any 'sexual or excretory meaning.'" App., *infra*, 29a. But the Commission has sensibly held that "both literal and non-literal uses of the 'F-Word' come within the subject matter scope of [its] indecency definition" because the "core meaning" of the "F-Word" has an inescapably "sexual connotation,"

and "the word's power to insult and offend derives from its sexual meaning." *Id.* at 118a; see *Golden Globe Awards Order*, 19 F.C.C.R. at 4979 ¶ 9 (any use of the word "invariably invokes a coarse sexual image"). Because the Commission's authority to regulate broadcast indecency has long been interpreted to depend upon a connection to sexual or excretory matters, see, *e.g.*, *Pacifica*, 438 U.S. at 732, if, under the court of appeals' reasoning, "non-literal" uses of even the most highly offensive sexual expletives have no such connection, then they would fall outside the Commission's regulatory power—no matter how many times those "non-literal" uses are deliberately repeated.

More broadly, the court of appeals' rejection of the Commission's contextual analysis strikes at the heart of broadcast indecency regulatory framework. As Judge Leval recognized, the FCC's focus on context "is in no way a consequence of the Commission's change of standard" with respect to isolated expletives. App., *infra*, 53a. Instead, the contextual approach "applies across the board to all circumstances," whether or not the material in question was repeated. *Ibid.* The adoption of a contextual approach to expletives is really just an effort to conform the treatment of expletives to the rest of the regulatory regime. *Id.* at 54a. As a result, the majority's criticism of the Commission's approach was in reality directed against the entire structure of Section 1464. *Id.* at 54a.

For example, the Commission took account of context in finding that the repeated use of expletives in Carlin's monologue was indecent, but that the repeated use of some of the same expletives in *Saving Private Ryan* was not. Compare *Pacifica*, 438 U.S. at 732, with *Saving Private Ryan Order*, 20 F.C.C.R. at 4512-4513 ¶¶ 14-15

(noting that, in context, the expletives were "integral to the film's objective of conveying the horrors of war" and were "neither gratuitous nor in any way intended or used to pander, titillate or shock"). According to the logic of the court of appeals, considering context in this manner would make it irrational to find the Carlin monologue (or a present-day expletive-filled rant by a radio shock jock) indecent.

Thus, the court's approach is difficult to square with *Pacifica*, and effectively nullifies the prohibition on indecent language found in Section 1464, which was upheld as constitutional in that decision. That result would not be surprising, since the court of appeals made little effort to hide its hostility to *Pacifica*'s reasoning. Compare, *e.g.*, *Pacifica*, 438 U.S. at 748-749 (describing "the broadcast media" as "uniquely pervasive" and "uniquely accessible to children"), with App., *infra*, 40a (questioning the accuracy of *Pacifica*'s holding to that effect). If the Commission's contextual analysis cannot survive the court's view of the FCC's obligation to provide a reasoned explanation—and if, as the court of appeals suggested, a per se prohibition on particular words is also not permissible—the FCC may find itself unable to fulfill a large portion of its broadcast indecency enforcement obligations.

The court of appeals' decision places the Commission in an untenable position. Although it orders a remand, the decision signals that there is no way for the Commission to regulate isolated expletives consistent with the parameters the court of appeals established. But Congress gave the Commission authority to regulate; *Pacifica* suggests that contextual regulation is not forbidden by the First Amendment; and the public rightfully expects the Commission to exercise what authority it has

to keep broadcast television suitable for children during certain hours. The court of appeals' decision suggests that the Commission retains some authority, but denies the Commission any permissible scope to exercise it, and leaves the Commission accountable for the coarsening of the airwaves while simultaneously denying it effective tools to address the problem.

At a minimum, the decision of the court of appeals is likely to generate considerable confusion for the Commission—which has pending before it hundreds of thousands of complaints regarding the broadcast of expletives, both isolated and repeated—and for broadcasters, leaving them uncertain as to the standards that are to govern the Commission's enforcement of the statutory prohibition on broadcast indecency. That confusion is unlikely to be resolved by allowing further percolation in the courts of appeals, because the possibility of further development of a circuit conflict is limited, at least as far as the major television networks are concerned. All of the network respondents appear to have their corporate headquarters in New York City, allowing them to confine any future challenges to the Second Circuit. See 28 U.S.C. 2343 (providing for venue in the D.C. Circuit and in the "circuit in which the petitioner resides or has its principal office"). Review by this Court is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 06-1760-ag (L), 06-2750-ag (CON),
06-5358-ag (CON)

FOX TELEVISION STATIONS, INC., CBS BROADCASTING, INC., WLS TELEVISION, INC., KTRK TELEVISION, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, RESPONDENTS

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., DOING BUSINESS AS CENTER FOR CREATIVE VOICES IN MEDIA, INC., ABC TELEVISION AFFILIATES ASSOCIATION, INTERVENORS

Decided: June 4, 2007

Before: LEVAL, POOLER, and HALL, Circuit Judges.

POOLER, Cicuirt Judge.

Fox Television Stations, Inc., along with its affiliates FBC Television Affiliates Association (collectively "Fox"), petition for review of the November 6, 2006, or-

der of the Federal Communications Commission ("FCC") issuing notices of apparent liability against two Fox broadcasts for violating the FCC's indecency and profanity prohibitions.[2] Fox, along with other broadcast networks and numerous amici, raise administrative, statutory, and constitutional challenges to the FCC's indecency regime. The FCC, also supported by several amici, dispute each of these challenges. We find that the FCC's new policy regarding "fleeting expletives" represents a significant departure from positions previously taken by the agency and relied on by the broadcast industry. We further find that the FCC has failed to articulate a reasoned basis for this change in policy. Accordingly, we hold that the FCC's new policy regarding "fleeting expletives" is arbitrary and capricious under the Administrative Procedure Act. The petition for review is therefore granted, the order of the FCC is vacated, and the matter is remanded to the Commission for further proceedings consistent with this opinion. Because we vacate the FCC's order on this ground, we do not reach the other challenges to the FCC's indecency regime raised by petitioners, intervenors, and amici.

BACKGROUND

The FCC's policing of "indecent" speech stems from 18 U.S.C. 1464, which provides that "[w]hoever utters any obscene, indecent, or profane language by means of

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[2] The petitions for review filed by Fox and CBS in Docket No. 06-1760 and ABC in Docket No. 06-2750 pertain to portions of a prior order by the FCC that has since been vacated. Accordingly, those petitions for review are denied as moot. The remainder of this opinion addresses the petition for review filed by Fox in Docket No. 06-5358.

radio communication shall be fined under this title or imprisoned not more than two years, or both." The FCC's authority to regulate the broadcast medium is expressly limited by Section 326 of the Communications Act, which prohibits the FCC from engaging in censorship. *See* 47 U.S.C. § 326. In 1960, Congress authorized the FCC to impose forfeiture penalties for violations of Section 1464. *See* 47 U.S.C. § 503(b)(1)(D). The FCC first exercised its statutory authority to sanction indecent (but non-obscene) speech in 1975, when it found Pacifica Foundation's radio broadcast of comedian George Carlin's "Filthy Words" monologue indecent and subject to forfeiture. *See Citizen's Complaint Against Pacifica Found. Station WBAI(FM), N.Y, N.Y.*, 56 F.C.C.2d 94 (1975). True to its title, the "Filthy Words" monologue contained numerous expletives in the course of a 12-minute monologue broadcast on the radio at 2:00 in the afternoon. In ruling on this complaint, the FCC articulated the following description of "indecent" content:

> [T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience.

Id. at 11 (internal footnote omitted).

Pacifica appealed the FCC's order to the Court of Appeals for the D.C. Circuit. While that appeal was pending, the FCC issued a "clarification" order in which it specifically noted that its prior order was intended to address only the particular facts of the Carlin monologue as broadcast, and acknowledged the concern that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *'Petition for Clarification or Reconsideration of a Citizen's Corıplaint against Pacifica Foundation, Station WBAI(FM), N.Y., N.Y.*, 59 F.C.C.2d 892, at ¶ 4 n.1 (1976) ("Pacifica Clarification Order"). The FCC stated that in such a situation, "we believe that it would be inequitable for us to hold a licensee responsible for indecent language." *Id.*

Although acknowledging the FCC's additional clarification, the D.C. Circuit nevertheless concluded that the FCC's indecency regime was invalid. *See Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977). Labeling the Commission's actions censorship, the court found the FCC's order both vague and overbroad, noting that it would prohibit "the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*." *Id.* at 14.

The Commission appealed this decision to the Supreme Court, which reversed in a plurality opinion. In its brief to the Supreme Court, the FCC stressed that its ruling was a narrow one applying only to the specific facts of the Carlin monologue. *See* Br. of FCC at 41-49, *FCC v. Pacifica Found.*, No. 77-528 (U.S. Mar. 3, 1978),

available at 1978 WL 206838. The Court took the Commission at its word and confined its review to the specific question of whether the Commission could find indecent the Carlin monologue as broadcast. *See FCC v. Pacifica Found.*, 438 U.S. 726, 732-35, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978). The Court first rejected Pacifica's statutory argument that "indecent" in Section 1464 could not be read to cover speech that admittedly did not qualify as obscenity. *Id.* at 739, 98 S. Ct. 3026. Finding that obscene, indecent, and profane have distinct meanings in the statute, the Court held that the FCC is permitted to sanction speech without showing that it satisfied the elements of obscenity. *Id.* at 739-41, 98 S. Ct. 3026. The Court then rejected Pacifica's constitutional challenges. The Court stated that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection" because the broadcast medium is a "uniquely pervasive presence in the lives of all Americans" that extends into the privacy of the home and is "uniquely accessible to children, even those too young to read." *Id.* at 748-749, 98 S. Ct. 3026. The Court therefore found that the FCC could, consistent with the First Amendment, regulate indecent material like the Carlin monologue. The Court then once again "emphasize[d] the narrowness of our holding . . . We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Id.* at 750-51, 98 S. Ct. 3026.

Justices Powell and Blackmun, who concurred in the judgment and supplied two of the votes necessary for

the 5-4 majority,[3] also emphasized in their concurring opinion that the Court's holding was a narrow one limited to the facts of the Carlin monologue as broadcast. *Id.* at 755-56, 98 S. Ct. 3026 (Powell J., concurring). Foreshadowing the question now before us, they explicitly noted that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here." *Id.* at 760-61, 98 S. Ct. 3026 (Powell J., concurring). Furthermore, citing the FCC's brief to the Court, Justice Powell stated that he did not foresee an undue chilling effect on broadcasters by the FCC's decision because "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 761 n.4, 98 S. Ct. 3026 (Powell J., concurring).

The FCC took the *Pacifica* Court's admonitions seriously in its subsequent decisions.[4] Shortly after the *Pacifica* ruling, the FCC stated the following in an opinion rejecting a challenge to a broadcaster's license renewal on the basis that the broadcaster had aired indecent programming:

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[3] The four dissenting justices would have held invalid any attempt by the FCC to prohibit indecent (non-obscene) speech. *See Pacifica*, 438 U.S. at 762-80, 98 S. Ct. 3026.

[4] At the time, the Commission interpreted *Pacifica* as involving a situation "about as likely to occur again as Halley's Comet." Br. of Amici Curiae Former FCC Officials at 6 (quoting FCC Chairman Charles D. Ferris, Speech to New England Broad. Assoc., Boston, Mass. (July 21, 1978)).

> With regard to 'indecent' or 'profane' utterances, the First Amendment and the 'no censorship' provision of Section 326 of the Communications Act severely limit any role by the Commission and the courts in enforcing the proscription contained in Section 1464. The Supreme Court's decision in *FCC v. Pacifica Foundation,* 46 U.S.L.W. 5018 (1978), No. 77-528, decided July 3, 1978, affords this Commission no general prerogative to intervene in any case where words similar or identical to those in Pacifica are broadcast over a licensed radio or television station. *We intend strictly to observe the narrowness of the Pacifica holding.* In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the 'indecent' words in question. The opinion of the Court specifically stated that it was not ruling that 'an occasional expletive . . . would justify any sanction . . .' Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been 'repeated over and over as a sort of verbal shock treatment.' He specifically distinguished 'the verbal shock treatment [in Pacifica]' from 'the isolated use of a potentially offensive word in the course of a radio broadcast.'

Application of WGBH Educ. Found., 69 F.C.C.2d 1250, at ¶ 10 (1978) (emphasis added) (ellipses in original; internal footnotes and citations omitted). The FCC also specifically held that the single use of an expletive in a program that aired at 5:30pm "should not call for us to act under the holding of *Pacifica.*" *Id.* at ¶ 10 n.6. A few years later, the Commission again rejected a challenge to a license renewal that complained the broadcaster

had aired indecent programming in violation of Section 1464. The FCC acknowledged the complaint that the broadcaster on three separate occasions had aired programming during the morning hours containing language such as "motherfucker," "fuck," and "shit," but nevertheless concluded that "it is clear that the petitioner has failed to make a *prima facie* case that [the broadcaster] has violated 18 U.S.C. 1464" since the language did not amount to "verbal shock treatment" and the complainant had failed to show this was more than "isolated use." *Application of Pacifica Found.*, 95 F.C.C.2d 750, at ¶¶ 16, 18 (1983).

It was not until 1987 that the FCC would find another broadcast "indecent" under Section 1464. *See Infinity Broad. Corp., et al.*, 3 F.C.C.R. 930 (1987) ("Infinity Order"). The Commission explained:

> In cases decided subsequent to the Supreme Court's ruling [in *Pacifica*], the Commission took a very limited approach to enforcing the prohibition against indecent broadcasts. Unstated, but widely assumed, and implemented for the most part through staff rulings, was the belief that only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975. Thus, no action was taken unless material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin "Filthy Words" monologue . . . As a result, the Commission, since the time of its ruling in 1975, has taken no action against any broadcast licensee for violating the prohibition against indecent broadcasts.

Id. at ¶ 4 (internal footnotes omitted). The Infinity Order affirmed on reconsideration three decisions issued

simultaneously by the FCC in April 1987 that found certain programs indecent. *See Pacifica Found., Inc.*, 2 F.C.C.R. 2698 (1987); *The Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987); *Infinity Broad. Corp.*, 2 F.C.C.R. 2705 (1987). The FCC explained in the Infinity Order that it would no longer take the narrow view that a finding of indecency required the use of one of the seven "dirty words" used in Carlin's monologue. *See Infinity Order*, at ¶ 5. The FCC instead would use the generic definition of indecency it had articulated in connection with its prior decision in *Pacifica*. *Id.* Under the Commission's definition, "indecent speech is language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. Such indecent speech is actionable when broadcast at times of the day when there is a reasonable risk that children may be in the audience." *Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703, at ¶ 3 (internal footnote omitted). The FCC also reaffirmed, however, the prevailing view that a fleeting expletive would not be actionable. *See id.* ("Speech that is indecent must involve more than an isolated use of an offensive word."); *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, at ¶ 13 ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."). Notably, in *Pacifica Foundation*, the Commission declined to make a finding of indecency against a radio broadcast of the program "Shocktime America," which had contained words and phrases such as "eat shit," "mother-fucker" and "fuck the U.S.A," in part because, without a transcript or tape of the program, the FCC was unable to

determine "whether the use of patently offensive speech was isolated." *Id.* at ¶¶ 3, 17.

Broadcasters appealed the Infinity Order to the D.C. Circuit, challenging the FCC's definition of indecency as unconstitutionally vague. *See Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I"), *superseded in part by Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (in banc). The D.C. Circuit rejected this argument on the basis that the definition at issue was "virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case." *Id.* at 1338. The court concluded that *Pacifica* implicitly rejected any vagueness challenge to the FCC's definition of "indecent," which therefore foreclosed its ability to revisit any such argument. *Id.* at 1339. The court then invited correction from "Higher Authority" if its reading of *Pacifica* was incorrect. *Id.* Before leaving the First Amendment issue, however, the court explicitly noted that the "FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy." *Id.* at 1340 n.14 (citing *Pacifica*, 438 U.S. at 761, 98 S. Ct. 3026 (Powell J., concurring)).

This restrained enforcement policy would continue. In 2001, pursuant to a settlement agreement by which the FCC agreed to clarify its indecency standards, the Commission issued a policy statement to "provide guidance to the broadcast industry regarding our case law interpreting 18 U.S.C. § 1464 and our enforcement policies with respect to broadcast indecency." *Industry*

Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999, at ¶ 1 & ¶ 30 n.23 (2001) ("Industry Guidance"). The FCC first noted that "indecent speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest." *Id.* at ¶ 3.

The FCC then explained that an indecency finding involves the following two determinations: (1) whether the material falls within the "subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities"; and (2) whether the broadcast is "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at ¶¶ 7-8. The FCC considers the following three factors in determining whether the material is patently offensive: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the materials *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate,* or *whether the material appears to have been presented for its shock value.*" *Id.* at ¶ 10. The policy statement contained numerous examples of prior FCC decisions evaluating whether certain material was indecent in an attempt to provide guidance to broadcasters. In discussing the second factor in the "patently offensive" analysis, the FCC cited examples distinguishing between material that "dwells" on the offensive content (indecent) and material that was "fleeting and isolated" (not indecent). *Id.* at ¶¶ 17-18.

This restrained enforcement policy would soon change. During NBC's January 19, 2003, live broadcast of the Golden Globe Awards, musician Bono stated in his acceptance speech "this is really, really, fucking brilliant. Really, really, great." *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, at ¶ 3 n.4 (2004) ("*Golden Globes*"). Individuals associated with the Parents Television Council filed complaints that the material was obscene and indecent under FCC regulations. *Id.* at ¶ 3. The FCC's Enforcement Bureau, however, denied the complaints on the basis that the expletive as used in context did not describe sexual or excretory organs or activities and that the utterance was fleeting and isolated. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19859, at ¶¶ 5-6 (Enforcement Bureau 2003) ("Golden Globes (Bureau Decision)"). The Bureau accordingly found that the speech "does not fall within the scope of the Commission's indecency prohibition," and reaffirmed FCC policy that "fleeting and isolated remarks of this nature do not warrant Commission action." *Id.* at ¶ 6.

Five months later, the full Commission reversed the Bureau's decision. First, the FCC held that any use of any variant of "the F-Word" inherently has sexual connotation and therefore falls within the scope of the indecency definition. *Golden Globes*, at ¶ 8. The FCC then held that "the 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language" and therefore the use of that word was patently offensive under contemporary community standards. *Id.* at ¶ 9. The Commission found the fleeting and isolated use of the word irrelevant and overruled

all prior decisions in which fleeting use of an expletive was held not indecent. *Id.* at ¶ 12 ("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.").

The FCC then held that the material in question was also "profane" under Section 1464. *Id.* at ¶ 13. The Commission acknowledged that prior decisions interpreting "profane" had defined that term as blasphemy, but found that nothing in its prior decisions limited the definition of profane in such a manner. *Id.* at ¶ 14. The Commission, however, declined to impose a forfeiture because "existing precedent would have permitted this broadcast" and therefore NBC and its affiliates "necessarily did not have the requisite notice to justify a penalty." *Id.* at ¶ 15. The Commission emphasized, though, that licensees were now on notice that any broadcast of the "F-Word" could subject them to monetary penalties and suggested that implementing delay technology would ensure future compliance with its policy. *Id.* at ¶ 17.

NBC, along with several other parties including Fox, filed petitions for reconsideration of the *Golden Globes* order, raising statutory and constitutional challenges to the new policy. NBC, Fox, and Viacom Inc. also filed a joint petition to stay the effect of the *Golden Globes* order. These petitions have been pending for more than two years without any action by the FCC. Nevertheless, the FCC has applied the policy announced in *Golden Globes* in subsequent cases.

On February 21, 2006, the FCC issued an order resolving various complaints against several television broadcasts. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 F.C.C.R. 2664 (2006) ("Omnibus Order"). Through this order, the FCC intended to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *Id.* at ¶ 2. In Section III.B of the Omnibus Order, the Commission found four programs—Fox's broadcast of the 2002 Billboard Music Awards, Fox's broadcast of the 2003 Billboard Music Awards, various episodes of ABC's NYPD Blue, and CBS's The Early Show—indecent and profane under the policy announced in *Golden Globes.* The factual situations at issue are as follows:

- **2002 Billboard Music Awards:** In her acceptance speech, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."

- **2003 Billboard Music Awards:** Nicole Richie, a presenter on the show, stated: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."

- **NYPD Blue:** In various episodes, Detective Andy Sipowitz and other characters used certain expletives including "bullshit," "dick," and "dickhead."

- **The Early Show:** During a live interview of a contestant on CBS's reality show Survivor: Vanuatu, the interviewee referred to a fellow contestant as a "bullshitter."

Id. at ¶¶ 101, 112 n.64, 125, 137. In finding these programs indecent and profane, the FCC reaffirmed its decision in *Golden Globes* that any use of the word "fuck" is presumptively indecent and profane. *Id.* at ¶¶ 102, 107. The Commission then concluded that any use of the word "shit" was also presumptively indecent and profane. *Id.* at ¶¶ 138, 143. Turning to the second part of its indecency test, the FCC found that each of the programs were "patently offensive" because the material was explicit, shocking, and gratuitous. *Id.* at ¶¶ 106, 120, 131, 141. Citing *Golden Globes,* the Commission dismissed the fact that the expletives were fleeting and isolated and held that repeated use is not necessary for a finding of indecency. *Id.* at ¶¶ 104, 116, 129, 140. The FCC, however, declined to issue a forfeiture in each case for the express reason that the broadcasts in question occurred before the decision in *Golden Globes,* and thus "existing precedent would have permitted this broadcast." *Id.* at ¶¶ 111, 124, 136, 145.

Fox and CBS filed a petition for review of the Omnibus Order in this court. ABC filed a petition for review in the D.C. Circuit, which was then transferred to this court and consolidated with the petition for review filed by Fox and CBS. Before any briefing took place, however, the FCC moved for a voluntary remand in order to give the Commission the first opportunity to address petitioners' arguments and "ensure that all licensees are afforded a full opportunity to be heard before the Commission issues a final decision." *See* FCC Mot. for Voluntary Remand at 2, No. 06-1760 (July 6, 2006). On September 7, 2006, this court granted the FCC's request for remand and stayed enforcement of the Omnibus Order. The Commission was given sixty days to issue a

final or appealable order, at which time the pending appeal would be automatically reinstated.

The FCC promptly issued a public notice soliciting comments on its decision in the Omnibus Order. Numerous parties, including those who have participated in the briefing in this appeal, submitted comments raising various statutory and constitutional arguments against the FCC's indecency regime. The FCC then issued a new order on November 6, 2006. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, FCC 06-166 (Nov. 6, 2006) ("Remand Order"). The Remand Order vacated Section III.B of the Omnibus Order in its entirety and replaced it with the Remand Order. *Id.* at ¶ 11. In the Remand Order, the FCC reaffirmed its finding that the 2002 and 2003 Billboard Music Award programs were indecent and profane, but reversed its finding against The Early Show. It also dismissed on procedural grounds the complaint against NYPD Blue.[5]

With regard to the 2003 Billboard Music Awards, the Commission found that it would have been actionably indecent even prior to the decision in *Golden Globes* because the potentially offensive material was "repeated,"

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[5] The Commission dismissed the complaint against NYPD Blue because the only person who complained of the material resided in the Eastern time zone, where NYPD Blue aired during the "safe harbor" period after 10pm. *Remand Order*, at ¶ 75; *see also* 47 C.F.R. § 73.3999(b) (providing that broadcasting of indecent material is prohibited only between the hours of 6am and 10pm); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II") ("safe harbor" period is constitutionally required), *superseded in part by Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (in banc). In light of the FCC's revised decision regarding NYPD Blue, ABC is no longer participating in this appeal.

since Nicole Richie used "two extremely graphic and offensive words" and was "deliberately uttered" because of "Ms. Richie's confident and fluid delivery of the lines." *Id.* at ¶ 22. With regard to the 2002 Billboard Music Awards, the Commission "acknowledge[d] that it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast." *Id.* at ¶ 60. In both cases, the FCC rejected Fox's argument that fleeting expletives were not actionable, now characterizing its prior decisions on that issue as "staff letters and dicta." *Id.* at ¶ 20. The Commission, however, declined to impose a forfeiture for either broadcast. *Id.* at ¶¶ 53, 66.

Turning to The Early Show, the FCC reversed its finding that the expletive used was indecent or profane because it occurred in the context of a "*bona fide* news interview." *Id.* at ¶ 68. The Commission stated that in light of First Amendment concerns, "it is imperative that we proceed with the utmost restraint when it comes to news programming," and found it "appropriate . . . to defer to CBS's plausible characterization of its own programming" as a news interview. *Id.* at ¶ 71-72. Given this context, the FCC declined to find the comment indecent or profane. *Id.* at ¶ 73.

In accordance with our September 6th order, this appeal was automatically reinstated on November 8, 2006. Fox then filed a petition for review of the Remand Order and moved to consolidate that appeal with the one already pending before this court. We granted the motion for consolidation as well as motions to intervene by CBS Broadcasting Inc. ("CBS") and NBC Universal Inc. and NBC Telemundo License Co. (collectively, "NBC"). We have also received several briefs from various amici.

DISCUSSION

Fox, CBS, and NBC (collectively, "the Networks"), supported by several amici, raise a variety of arguments against the validity of the Remand Order, including: (1) the Remand Order is arbitrary and capricious because the Commission's regulation of "fleeting expletives" represents a dramatic change in agency policy without adequate explanation; (2) the FCC's "community standards" analysis is arbitrary and meaningless; (3) the FCC's indecency findings are invalid because the Commission made no finding of scienter; (4) the FCC's definition of "profane" is contrary to law; (5) the FCC's indecency regime is unconstitutionally vague; (6) the FCC's indecency test permits the Commission to make subjective determinations about the quality of speech in violation of the First Amendment; and (7) the FCC's indecency regime is an impermissible content-based regulation of speech that violates the First Amendment. The FCC, also supported by several amici, dispute each of these contentions. We agree with the first argument advanced by the Networks, and therefore do not reach any other potential problems with the FCC's decision.

I. Scope of Review

Before turning to the merits of the Networks' arguments, we first note that we reject the FCC's contention that our review here is narrowly confined to the specific question of whether the two Fox broadcasts of the Billboard Music Awards were indecent and/or profane. The Remand Order applies the policy announced in *Golden Globes*. If that policy is invalid, then we cannot sustain the indecency findings against Fox. Thus, as the Commission conceded during oral argument, the validity of the new "fleeting expletive" policy announced in *Golden*

Globes and applied in the Remand Order is a question properly before us on this petition for review. As the D.C. Circuit explained in rejecting this precise argument in another proceeding, "the agency may not resort to adjudication as a means of insulating a generic standard from judicial review." *ACT I*, 852 F.2d at 1337.

II. Administrative Procedure Act

Courts will set aside agency decisions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the Supreme Court has explained: "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Reviewing courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)). The Networks contend that the Remand Order is arbitrary and capricious because the FCC has made a 180-degree turn regarding its treatment of "fleeting exple-

tives" without providing a reasoned explanation justifying the about-face. We agree.

First, there is no question that the FCC has changed its policy. As outlined in detail above, prior to the *Golden Globes* decision the FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime. *See, e.g., Pacifica Clarification Order,* 59 F.C.C.2d 892, at ¶ 4 n.1 (advising broadcasters that "it would be inequitable for us to hold a licensee responsible for indecent language" that occurred during a live broadcast without an opportunity for journalistic editing); *Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, at ¶ 10 & n.6 (distinguishing between the "verbal shock treatment" of the George Carlin monologue and "the isolated use of a potentially offensive word" and finding that the single use of an expletive in a program "should not call for us to act under the holding of *Pacifica*"); *Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698, at ¶ 13 ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a *requisite* to a finding of indecency." (emphasis added)); *Industry Guidance,* 16 F.C.C.R. 7999, at ¶¶ 17-18 (distinguishing between material that is repeated or dwelled on and material that is "fleeting and isolated") (citing *L.M. Communications of S.C., Inc.*, 7 F.C.C.R. 1595 (Mass Media Bureau 1992) (finding the single utterance of "mother-fucker" not indecent because it was a "fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction"); *Lincoln Dellar, For Renewal of the Licenses of Stations KPRL(AM) and KDDB(FM),* 8 F.C.C.R. 2582 (Audio Serv. Div. 1993) (news an-

nouncer's remark that he "fucked that one up" not indecent because the "use of a single expletive" did not warrant further review "in light of the isolated and accidental nature of the broadcast")). This consistent enforcement policy changed with the issuance of *Golden Globes*:

> While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the "F-Word" such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law. . . . The staff has since found that the isolated or fleeting use of the "F-Word" is not indecent in situations arguably similar to that here. We now depart from this portion of the Commission's 1987 *Pacifica* decision as well as all of the cases cited in notes 31 and 32 and any similar cases holding that isolated or fleeting use of the "F-Word" or a variant thereof in situations such as this is not indecent and conclude that such cases are not good law to that extent.

Golden Globes, 19 F.C.C.R. 4975, at ¶ 12 (internal footnote omitted); *see also id.* at ¶ 14 (providing new definition of "profane" speech). The Commission declined to issue a forfeiture in *Golden Globes* precisely because its decision represented a departure from its prior rulings. *See id.* at ¶ 15 ("Given, however, that Commission and staff precedent prior to our decision today *permitted the broadcast at issue*, and that we take a *new approach to profanity*, NBC and its affiliates necessarily did not have the requisite notice to justify a penalty." (emphasis added)). The Omnibus Order similarly declined to issue a forfeiture because "existing precedent would have per-

mitted this broadcast." *Omnibus Order*, 21 F.C.C.R. 2664, at ¶¶ 111, 124, 136, 145.

Although the Remand Order backpedals somewhat on this clear recognition that the Commission was departing from prior precedent,[6] in its brief to this court, the FCC now concedes that *Golden Globes* changed the landscape with regard to the treatment of fleeting expletives. *See* Br. of Respondent FCC at 33 ("In the *Golden Globe Order*, the Commission made clear that it was changing course with respect to the treatment of isolated expletives."); *see also* Br. of Amici Curiae Former FCC Officials at 9 (noting that the "extraordinary and unprecedented" decision in *Golden Globes* represented a radical change in policy that "greatly expanded the scope of what constituted indecency").

Agencies are of course free to revise their rules and policies. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("An initial agency interpretation is not instantly carved in stone."). Such a change, however, must provide a reasoned analysis for departing from prior precedent. As this court has explained:

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[6] In the Remand Order, the FCC "reject[s] Fox's suggestion that Nicole Richie's comments would not have been actionably indecent prior to our *Golden Globe* decision," and would only concede that it was "not apparent" that Cher's comment at the 2002 Billboard Music Awards would have been actionably indecent at the time it was broadcast. *Remand Order*, at ¶¶ 22, 60. Decisions expressly overruled in *Golden Globes* were now dismissed as "staff letters and dicta," and the Commission even implied that the issue of fleeting expletives was one of first impression for the FCC in *Golden Globes*. *Id.* at ¶ 21 ("[I]n 2004, the Commission itself considered for the first time in an enforcement action whether a single use of an expletive could be indecent.").

> [W]hen an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act. In addition, the agency must consider reasonably obvious alternatives and, if it rejects those alternatives, it must give reasons for the rejection, sufficient to allow for meaningful judicial review. Although there is not a "heightened standard of scrutiny . . . *the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.*" Even in the absence of cumulative experience, changed circumstances or judicial criticism, an agency is free to change course after reweighing the competing statutory policies. But such a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute *as well as or better than the old rule.*

N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth., 757 F.2d 502, 508 (2d Cir. 1985) (second emphasis added; internal citations omitted); *see also State Farm*, 463 U.S. at 41-42, 103 S. Ct. 2856 ("A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." (internal quotation marks omitted)); *Huntington Hosp. v. Thompson*, 319 F.3d 74, 79 (2d Cir. 2003) ("While an agency is not locked into the first interpretation of a statute it embraces, it cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.'"); *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 129 (2d

Cir. 1993) ("When the Commission departs from its own settled precedent, as here, it must present a 'reasoned analysis' that justifies its change of interpretation so as to permit judicial review of its new policies."). An agency's "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Ramaprakash v. FAA.*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (internal quotation marks omitted). Accordingly, agency action will be set aside as arbitrary and capricious if the agency fails to provide a reasoned explanation for its decision. *See, e.g., Massachusetts v. EPA*, —U.S.—, 127 S. Ct. 1438, 1463, 167 L. Ed. 2d 248 (2007) ("EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore arbitrary, capricious, . . . or otherwise not in accordance with law.") (ellipses in original; internal quotation marks omitted); *State Farm*, 463 U.S. at 34, 103 S. Ct. 2856 (agency's rescinding of rule requiring passive restraints in automobiles was arbitrary and capricious for failure to provide a reasoned explanation justifying revocation); *see also Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 72 (2d Cir. 2006) (agency action based on new rule governing Medicare reimbursement was arbitrary and capricious "because the Secretary did not satisfactorily explain his reasons" for changing historical practice); *ANR Pipeline Co. v. Fed. Energy Regulatory Comm'n*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.").

Our evaluation of the agency's reasons for its change in policy is confined to the reasons articulated by the agency itself. *See State Farm*, 463 U.S. at 50, 103 S. Ct. 2856 ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (internal citation omitted)); *Yale-New Haven Hosp.*, 470 F.3d at 81 ("Generally speaking, after-the-fact rationalization for agency action is disfavored."). The primary reason for the crackdown on fleeting expletives advanced by the FCC is the so-called "first blow" theory described in the Supreme Court's *Pacifica* decision. In *Pacifica*, the Supreme Court justified the FCC's regulation of the broadcast media in part on the basis that indecent material on the airwaves enters into the privacy of the home uninvited and without warning. 438 U.S. at 748, 98 S. Ct. 3026. The Court rejected the argument that the audience could simply tune-out: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *Id.* at 748-49, 98 S. Ct. 3026. Relying on this statement in *Pacifica*, the Commission attempts to justify its stance on fleeting expletives on the basis that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" *Remand Order*, at ¶ 25.

We cannot accept this argument as a reasoned basis justifying the Commission's new rule. First, the Commission provides no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful "first blow" for the nearly thirty years between *Pacifica* and *Golden Globes*. More problematic,

however, is that the "first blow" theory bears no rational connection to the Commission's actual policy regarding fleeting expletives. As the FCC itself stressed during oral argument in this case, the Commission does not take the position that *any* occurrence of an expletive is indecent or profane under its rules.[7] For example, although "there is no outright news exemption from our indecency rules," *Remand Order*, at ¶ 71, the Commission will apparently excuse an expletive when it occurs during a "*bona fide* news interview," *id.* at ¶ 72-73 (deferring to CBS's "plausible characterization" of a segment of The Early Show interviewing a contestant on its reality show Survivor: Vanuatu as news programming and finding expletive uttered during that part of the show not indecent or profane). Certainly viewers (including children) watching the live broadcast of The Early Show were "force[d] . . . to take the 'first blow" of the expletive uttered by the Survivor: Vanuatu contestant. Yet the Commission emphasized during oral argument that its news exception is a broad one and "the Commission has never found a broadcast to be indecent on the basis of an isolated expletive in the face of some claim that the use of that language was necessary for any journalistic or artistic purpose." The Commission further explained to this court that a broadcast of oral argument in this case, in which the same language used in the Fox broadcasts was repeated multiple times in the

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[7] Such a per se ban would likely raise constitutional questions above and beyond the concerns raised by the current policy. *See Pacifica*, 438 U.S. at 746, 98 S. Ct. 3026 (plurality opinion) ("Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected.").

courtroom, would "plainly not" be indecent or profane under its standards because of the context in which it occurred. The Commission even conceded that a rebroadcast of precisely the same offending clips from the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC, even though in those circumstances viewers would be subjected to the same "first blow" that resulted from the original airing of this material. Furthermore, the Commission has also held that even repeated and deliberate use of numerous expletives is not indecent or profane under the FCC's policy if the expletives are "integral" to the work. *See Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Televison Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, at ¶ 14 (2005) ("Saving Private Ryan") (finding numerous expletives uttered during film Saving Private Ryan not indecent or profane because deleting the expletives "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers"). In all of these scenarios, viewers, including children who may have no understanding of whether expletives are "integral" to a program or whether the interview of a contestant on a reality show is a "*bona fide* news interview," will have to accept the alleged "first blow" caused by use of these expletives. Thus, the record simply does not support the position that the Commission's new policy was based on its concern with the public's mere exposure to this language on the air-

waves.[8] The "first blow" theory, therefore, fails to provide the reasoned explanation necessary to justify the FCC's departure from established precedent.[9]

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[8] Thus, our rejection of the agency's proffered rationale as the required "reasoned explanation" is not that the "Commission's change of standard is irrational because it is inconsistent" as the dissent suggests, dissent op. at 471, but that the Commission's proffered rationale is disconnected from the actual policy implemented by the Commission. *See State Farm*, 463 U.S. at 43, 103 S. Ct. 2856 (Agency action is arbitrary and capricious if the agency fails to "articulate a *satisfactory explanation* for its action including a '*rational connection* between the facts found and the choice made.'") (emphasis added).

[9] The dissent takes the position that the "reasoned analysis" underlying the FCC's change in policy is its statement in *Golden Globes* that "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation. . . . The 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image." Dissent Op. at 468-69 (quoting *Golden Globes*, at ¶¶ 8-9). Much like the "first-blow" theory, however, this cannot provide the requisite "reasoned analysis" because it is not consistent with the Commission's actual policy. The FCC's change in policy cannot be based on a categorical view that "any use of that word or a variation, *in any context*, inherently has a sexual connotation," *Golden Globes*, at ¶ 8 (emphasis added), because, as discussed above, the Commission permits even numerous and deliberate uses of that word in certain contexts. Notably, the FCC did not rely on this statement from *Golden Globes* in

The Remand Order makes passing reference to other reasons that purportedly support its change in policy, none of which we find sufficient. For instance, the Commission states that even non-literal uses of expletives fall within its indecency definition because it is "difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions." *Remand Order*, at ¶ 23. This defies any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any "sexual or excretory" meaning. Bono's exclamation that his victory at the Golden Globe Awards was "really, really fucking brilliant" is a prime example of a non-literal use of the "F-Word" that has no sexual connotation. *See Golden Globes (Bureau Decision)*, 18 F.C.C.R. 19859, at ¶ 5 ("As a threshold matter, the material aired during the 'Golden Globe Awards' program does not describe or depict sexual and excretory activities and organs. . . . Rather, the performer used the word 'fucking' as an adjective or expletive to emphasize an exclamation."), *rev'd by Golden Globes*, 19 F.C.C.R. 4975 (2004). Similarly, as NBC illustrates in its brief, in recent times even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced "sexual or excretory organs or activities." *See* Br. of Intervenor NBC at 31-32 & n.3 (citing President Bush's remark to British Prime Minister Tony Blair that the United Nations needed to "get Syria to get Hezbollah to stop doing this shit" and Vice President Cheney's widely-reported "Fuck yourself" comment to

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arguing that it provided a reasoned explanation for its decision. *See* Br. of Respondent FCC, at 36-37.

Senator Patrick Leahy on the floor of the U.S. Senate).[10] Similarly, the Commission's warning that a per se exemption for fleeting expletives would "permit broadcasters to air expletives at all hours of the day so long as they did so one at a time," *Remand Order*, at ¶ 25, is equally divorced from reality because the Commission itself recognizes that broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes*, *see Remand Order*, at ¶ 29.[11] Finally, the Com

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[10] Contrary to the dissent's view, our rejection of this proffered rationale is not merely a "difference of opinion" with the agency. Dissent op. at 473-74. We reject this reason not because we disagree with it, but because it is both unsupported by any record evidence as well as contradicted by evidence submitted by the Networks. Thus, we need not consider whether the FCC's statement that "any use of [the F-Word] or a variation, in any context, inherently has a sexual connotation," in actuality means, "even when the speaker does not intend a sexual meaning, a substantial part of the community, and of the television audience, will understand the word as freighted with an offensive sexual connotation," as the dissent suggests. *Id.* Even if we accept the dissent's reading, the FCC still has failed to set forth the required reasoned explanation because its proffered rationale remains unsupported by any record evidence and contradicted by the evidence submitted by the Networks. *See Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626, 106 S. Ct. 2101, 90 L. Ed. 2d 584 (1986) ("Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action.") (plurality op).

[11] We agree with the dissent that this proffered rationale "is at most a small part of the agency's justification for its action," dissent op. at 473, but because it is one of the reasons advanced by the agency, we address it here. We disagree with the dissent, however, that our rejection of this proffered rationale is a mere difference of opinion with the agency in predicting the future. The FCC's obligation to provide a "reasoned analysis" for its change in policy is not satisfied when the proffered rationale—that without its new policy the airwaves will be overtaken by fleeting expletives—is both unsupported by any evidence and directly contradicted by prior experience. We further note while

mission's claim that "categorically requiring repeated use . . . is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context," *Remand Order*, at ¶ 23, also does not provide sufficient justification for its departure from prior precedent. First, the Commission's own policy of treating all variants of certain expletives as presumptively indecent and profane, whether used in a literal or non-literal sense, also fails to comport with this "general approach" that "stresses the critical nature of context." *See, e.g., Golden Globes*, 19 F.C.C.R. 4975, at ¶ 8 (declaring that "any use of [the F-Word] or a variation, *in any context*, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition") (emphasis added). In addition, the Commission's indecency test itself remains unchanged, but the Commission fails to provide a reasoned explanation for why a single, isolated expletive now should fit within the articulation of that test set forth in *Golden Globes*, *see Pacifica Found., Inc.*, 2 F.C.C.R. 2698, at ¶ 13 ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.").

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the dissent attempts to provide support for the agency's prediction, including broadcasters' need to compete with cable "which increasingly make liberal use of their freedom to fill programming with such expletives," dissent op. at 472, no evidence supporting this proposition is contained in the record that was considered by the FCC when rendering its decision. *See, e.g., State Farm*, 463 U.S. at 43, 103 S. Ct. 2856 ("The reviewing court should not attempt itself to make up for [the agency's] deficiencies: 'We may not supply a reasoned basis for the agency's action that the agency itself has not given.'") (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)).

For decades broadcasters relied on the FCC's restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent. The agency asserts the same interest in protecting children as it asserted thirty years ago, but until the *Golden Globes* decision, it had never banned fleeting expletives. While the FCC is free to change its previously settled view on this issue, it must provide a reasoned basis for that change. Cf. *State Farm*, 463 U.S. at 42, 103 S. Ct. 2856 ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change *beyond that which may be required* when an agency does not act in the first instance.") (emphasis added). The FCC's decision, however, is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation. Such evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech. Yet the Remand Order provides no reasoned analysis of the purported "problem" it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable. *See, e.g.*, *United States v. Playboy Enter. Group, Inc.*, 529 U.S. 803, 822-23, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) (rejecting indecency regulation of cable television in part because "[t]he question is whether an actual problem has been proved in this case. We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban."); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (remanding for

additional fact finding to determine whether speech regulation justified because government had failed to demonstrate "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985) (invalidating FCC regulation because "the Commission has failed entirely to determine whether the evil the rules seek to correct 'is a real or merely a fanciful threat'"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." (internal quotation marks omitted)). The Commission has similarly failed to explain how its current policy would remedy the purported "problem" or to point to supporting evidence.

The Commission's new approach to profanity is supported by even less analysis, reasoned or not. The Commission sets forth no independent reasons that would justify its newly-expanded definition of "profane" speech, aside from merely stating that its prior precedent does not prevent it from setting forth a new definition, *see Golden Globes*, 19 F.C.C.R. 4975, at ¶ 14. To the extent the Commission believes its arguments for expanding its indecency enforcement support its new policy regarding profanity, those arguments are rejected for the reasons stated above. Furthermore, the Commission fails to provide any explanation for why this separate ban on profanity is even necessary. Prior to 2004, the Commission never attempted to regulate "profane" speech. In fact, the Commission took the view that a separate ban on profane speech was unconstitutional. *See* 122 Cong. Rec. 33359, 33359, 33364-65 (1976) (rec-

ommending Congress delete "profane" from Section 1464 "[b]ecause of the serious constitutional problems involved"); FCC, *The Public and Broadcasting,* 1999 WL 391297 (June 1999) ("Profanity that does not fall under one of the above two categories [indecent or obscene] is fully protected by the First Amendment and cannot be regulated."). The Commission again has not provided this court with a reasoned analysis of why it has undertaken this separate regulation of speech. Finally, the Commission provides no explanation of what harm this separate enforcement against profane speech addresses that is not already addressed by the FCC's indecency and obscenity enforcement. Particularly considering that the scope of the FCC's new profanity definition appears to be largely (if not completely) redundant with its indecency prohibition, *see infra* Part IV, this would seem to be an important question for the Commission to consider. The Remand Order, however, provides no indication that the Commission has engaged in any such analysis.

Accordingly, we find that the FCC's new policy regarding "fleeting expletives" fails to provide a reasoned analysis justifying its departure from the agency's established practice. For this reason, Fox's petition for review is granted, the Remand Order is vacated, and the matter is remanded to the FCC for further proceedings consistent with this opinion. Because we have found that the FCC's new indecency regime, announced in *Golden Globes* and applied in the Remand Order, is invalid under the Administrative Procedure Act, the stay

of enforcement previously granted by this court in our September 6th order is vacated as moot.[12]

III. Constitutional Challenges

"A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988). Thus, we refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks. We note, however, that in reviewing these numerous constitutional challenges, which were fully briefed to this court and discussed at length during oral argument, we are skeptical that the Commission can provide a reasoned explanation for its "fleeting expletive" regime that would pass constitutional muster. Because we doubt that the Networks will refrain from further litigation on these precise issues if, on remand, the Commission merely provides further explanation with no other changes to its policy, in the interest of judicial economy we make the following observations.

As an initial matter, we note that *all* speech covered by the FCC's indecency policy is fully protected by the

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[12] We recognize that what follows is dicta, but we note that "dicta often serve extremely valuable purposes. They can help clarify a complicated subject. They can assist future courts to reach sensible, well-reasoned results. They can help lawyers and society to predict the future course of the court's rulings. They can guide future courts to adopt fair and efficient procedures. What is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum." The Honorable Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U.L. Rev. 1249, 1253 (2006).

First Amendment. *See Sable Commc'ns v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989) (noting that speech "which is indecent but not obscene is protected by the First Amendment"); *Industry Guidance*, 16 F.C.C.R. 7999, at ¶ 3 ("[I]ndecent speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest."). With that backdrop in mind, we question whether the FCC's indecency test can survive First Amendment scrutiny. For instance, we are sympathetic to the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague. Although the Commission has declared that all variants of "fuck" and "shit" are presumptively indecent and profane, repeated use of those words in "Saving Private Ryan," for example, was neither indecent nor profane. And while multiple occurrences of expletives in "Saving Private Ryan" was not gratuitous, *Saving Private Ryan*, 20 F.C.C.R. 4507, at ¶ 14, a single occurrence of "fucking" in the Golden Globe Awards was "shocking and gratuitous," *Golden Globes*, 19 F.C.C.R. 4975, at ¶ 9. Parental ratings and advisories were important in finding "Saving Private Ryan" not patently offensive under contemporary community standards, *Saving Private Ryan*, 20 F.C.C.R. 4507, at ¶ 15, but irrelevant in evaluating a rape scene in another fictional movie, *see Omnibus Order*, 21 F.C.C.R. 2664, at ¶ 38 (issuing maximum forfeiture penalty against NBC Telemundo for movie "Con el Corazón en la Mano"). The use of numerous expletives was "integral" to a fictional movie about war, *Saving Private Ryan*, 20 F.C.C.R. 4507, at ¶ 14, but occasional exple-

tives spoken by real musicians were indecent and profane because the educational purpose of the documentary "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives," *Omnibus Order*, 21 F.C.C.R. 2664, at ¶ 82 (finding Martin Scorsese's PBS documentary "The Blues: Godfathers and Sons" indecent). The "S-Word" on The Early Show was not indecent because it was in the context of a "*bona fide* news interview," but "there is no outright news exemption from our indecency rules," *Remand Order*, at ¶¶ 68, 71-73. We can understand why the Networks argue that the FCC's "patently offensive as measured by contemporary community standards" indecency test coupled with its "artistic necessity" exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

The Networks' position is further buttressed by the Supreme Court's decision in *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), which struck down as unconstitutionally vague a similarly-worded indecency regulation of the Internet.[13] The Court found that the statute's use of the "general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value. Moreover, the 'community

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[13] Section 223(d) of the of the Communications Decency Act prohibited material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Reno*, 521 U.S. at 860, 117 S. Ct. 2329.

standards' criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-78, 117 S. Ct. 2329. Because of the "vague contours" of the regulation, the Court held that "it unquestionably silences some speakers whose messages would be entitled to constitutional protection," and thus violated the First Amendment. *Id.* at 874, 117 S. Ct. 2329. Because *Reno* holds that a regulation that covers speech that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" is unconstitutionally vague, we are skeptical that the FCC's identically-worded indecency test could nevertheless provide the requisite clarity to withstand constitutional scrutiny. Indeed, we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified "context" of a broadcast indecency.

We also note that the FCC's indecency test raises the separate constitutional question of whether it permits the FCC to sanction speech based on its subjective view of the merit of that speech. It appears that under the FCC's current indecency regime, any and all uses of an expletive is presumptively indecent and profane with the broadcaster then having to demonstrate to the satisfaction of the Commission, under an unidentified burden of proof, that the expletives were "integral" to the work. In the licensing context, the Supreme Court has cautioned against speech regulations that give too much discretion to government officials. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992) ("A government

regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (finding a permit scheme facially unconstitutional because "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression"). In succeeding on this challenge, the Networks need not prove that the FCC "has exercised [its] discretion in a content-based manner, but whether there is anything in [its policy] preventing [it] from doing so." *Forsythe*, 505 U.S. at 133 n.10, 112 S. Ct. 2395 ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.").

Finally, we recognize there is some tension in the law regarding the appropriate level of First Amendment scrutiny. In general, restrictions on First Amendment liberties prompt courts to apply strict scrutiny. *FCC v. League of Women Voters*, 468 U.S. 364, 376, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984). Outside the broadcasting context, the Supreme Court has consistently applied strict scrutiny to indecency regulations. *See, e.g., Playboy*, 529 U.S. at 811-813, 120 S. Ct. 1878 (holding that regulation proscribing indecent content on cable television was content-based restriction of speech subject to strict scrutiny); *Sable*, 492 U.S. at 126, 109 S. Ct. 2829 (holding that indecency regulation of telephone messages was content-based restriction subject to strict

scrutiny); *Reno*, 521 U.S. at 868, 117 S. Ct. 2329 (holding that indecency regulation of Internet was a content-based restriction subject to strict scrutiny). At the same time, however, the Supreme Court has also considered broadcast media exceptional. "[B]ecause broadcast regulation involves unique considerations, our cases . . . have never gone so far as to demand that such regulations serve 'compelling' governmental interests." *League of Women Voters*, 468 U.S. at 376, 104 S. Ct. 3106. Restrictions on broadcast "speech" have been upheld "when we [are] satisfied that the restriction is narrowly tailored to further a substantial governmental interest." *Id.* at 380, 104 S. Ct. 3106.

The Networks contend that the bases for treating broadcast media "different[ly]" have "eroded over time," particularly because 86 percent of American households now subscribe to cable or satellite services, *Remand Order*, at ¶ 49. As the Networks argue, this and other realities have "eviscerated" the notion that broadcast content is, as it was termed in *Pacifica*, 438 U.S. at 748-49, 98 S. Ct. 3026, "uniquely pervasive" and "uniquely accessible to children." Whatever merit these arguments may have, they cannot sway us in light of Supreme Court precedent. *See, e.g., Reno*, 521 U.S. at 867, 117 S. Ct. 2329 (noting that "as a matter of history" broadcast television has enjoyed less First Amendment protection than other media, including the internet); *Pacifica*, 438 U.S. at 748-50, 98 S. Ct 3026.

Nevertheless, we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast

television. In light of this possibility, the Networks rightly rest their constitutional argument in part on the holding of *Playboy*, which involved a challenge to a statute requiring cable operators who provide channels primarily dedicated to sexually explicit or otherwise indecent programming to either fully scramble these channels or limit their transmission to the 10 pm to 6 am safe harbor period. 529 U.S. at 806, 120 S. Ct. 1878. The Supreme Court, applying strict scrutiny, invalidated the statute because a less restrictive alternative to the prohibition existed: "One plausible, less restrictive alternative could be found in another section of the [Telecommunications] Act [of 1996]: § 504, which requires a cable operator, 'upon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block' any channel the subscriber does not wish to receive." *Id.* at 809-10, 120 S. Ct. 1878. The Court held: This "targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." *Id.* at 815, 120 S. Ct. 1878. In so holding, the Court suggested its decision might go beyond the mechanistic application of strict scrutiny, and rely in part on a notional pillar of free speech—namely, choice:

> When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of

> view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

Id. at 818, 120 S. Ct. 1878. The Court specifically rejected the arguments that parents' ignorance of this option, its underutilization, or its inability to be 100% effective rendered targeted blocking an ineffective alternative: "It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Id.* at 824, 120 S. Ct. 1878.

The Networks argue that the advent of the V-chip and parental ratings system[14] similarly provide a less

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[14] In 1996, Congress mandated that every television, 13 inches or larger, sold in the United States, come equipped with blocking technology commonly known as the V-chip. *See* 47 U.S.C. § 303(x) (stating that in the case of an "apparatus" designed to receive television signals, "such apparatus [shall] be equipped with a feature designed to enable viewers to block display of all programs with a common rating"). To implement V-chip technology, Congress also required a television ratings system. The industry developed the "TV Parental Guidelines" rating system, which was approved by the FCC. *See In the Matter of Implementation of Section 551 of the Telecommunications Act of 1996*, 13 F.C.C.R. 8232, at ¶ 2.

restrictive alternative to the FCC's indecency ban. The FCC counters that the V-chip is an ineffective alternative because, in its view, few televisions feature a V-chip, most parents do not know how to use it, programs are often inaccurately rated, and fleeting expletives, such as those witnessed at the programs at issue here, could elude V-chip blocking even if the show during which they occurred was otherwise accurately labeled. *See Remand Order*, at ¶ 51 & n.162. The FCC's arguments are not without merit, but they must be evaluated in the context of today's realities. The proliferation of satellite and cable television channels—not to mention internet-based video outlets—has begun to erode the "uniqueness" of broadcast media, while at the same time, blocking technologies such as the V-chip have empowered viewers to make their own choices about what they do, and do not, want to see on television. *Playboy* distinguished *Pacifica* on the grounds that "[c]able systems have the capacity to block unwanted channels on a household-by-household basis" and thus "[t]he option to block reduces the likelihood, so concerning to the Court in *Pacifica*, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem." 529 U.S. at 815, 120 S. Ct. 1878 (internal citation omitted). The FCC is free to regulate indecency, but its regulatory powers are bounded by the Constitution. If the *Playboy* decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC's robust oversight.

IV. The FCC's Construction of Profane

The Networks also argue that the FCC employed an improper definition of "profane" under Section 1464. Although we need not reach this argument to dispose of

this appeal, on remand, the FCC may desire to explain its gloss on the definition of "profane." In the *Remand Order*, the FCC applied its new definition of "profane" as set forth in *Golden Globes*. The FCC now defines "profane" as "those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Golden Globes*, 19 F.C.C.R. 4975, at ¶ 13 (quoting *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972)). The FCC, noting that "shit" and "fuck" fall within this definition, ruled that Cher's and Nicole Richie's fleeting expletives were "profane," as well as indecent. Most dictionaries interpret the term "profane" to denote something that pertains to the irreligious, and since 1927, courts—as well as the FCC itself—have assumed that "profane" in the broadcast context refers to sacrilege, and nothing more. *See, e.g. Duncan v. United States*, 48 F.2d 128, 134 (9th Cir. 1931) (collecting cases and holding defendant "was properly convicted of using profane language" where he "referred to an individual as 'damned,' . . . used the expression 'By God' irreverently, and . . . announced his intention to call down the curse of God"); *Gagliardo v. United States*, 366 F.2d 720, 725 (9th Cir. 1966) ("the only words attributed to appellants which could even remotely be considered as being 'profane' . . . were 'God damn it'"); *In re Complaint by Warren B. Appleton, Brockton, Mass.*, 28 F.C.C.2d 36 (1971) (analyzing the word "damn" as a matter of profanity). As the FCC notes, the Seventh Circuit's 1972 *Tallman* decision, 465 F.2d at 286, suggested an alternate definition for this term, but we do not believe the FCC can find refuge in this case. *Tall-*

man concerned a prosecution for obscenity, not profanity, and thus the *Tallman* court had no occasion to determine conclusively how profane should be interpreted. *See id.* ("The trial judge did not undertake to define the terms 'indecent' and 'profane,' but he had no occasion to do so because he determined that petitioner's utterances were properly classifiable as 'obscene.'"). The *Tallman* court's brief reference to "profane" served only to demonstrate that there may be a construction of "profane" that could pass constitutional scrutiny.

But the FCC's definition of "profane" here, would substantially overlap with the statutory term "indecent." This overlap would be so extensive as to render the statutory term "indecent" superfluous. Because our canons of statutory construction do not permit such an interpretation, *see TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001), we do not believe the FCC has proffered a reasonable construction of the term "profane." While we may owe *Chevron* deference to the FCC's construction, the FCC must still demonstrate that its construction is reasonable, particularly in light of Congressional intent, the canons of statutory construction, and the historical view of the plain meaning of this term.

CONCLUSION

As the foregoing indicates, we are doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the Networks. Nevertheless, because we can decide this case on this narrow ground, we vacate and remand so that the Commission can set forth that analysis. While we fully expect the Networks to

raise the same arguments they have raised to this court if the Commission does nothing more on remand than provide additional explanation for its departure from prior precedent, we can go no further in this opinion. Accordingly, we grant the petition for review, vacate the order of the FCC, and remand the case for further proceedings consistent with this opinion. The stay previously granted by this court is vacated as moot.

LEVAL, Circuit Judge, dissenting.

I respectfully dissent from my colleagues' ruling because I believe the Federal Communications Commission ("FCC" or "Commission") gave a reasoned explanation for its change of standard and thus complied with the requirement of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

A television broadcaster, Fox Television Stations, Inc., challenges the lawfulness of a small change made by the FCC in its standards for adjudicating complaints of indecency over the airwaves. The Commission exercises the responsibility of determining, upon receipt of public complaints, whether a licensed broadcaster has violated 18 U.S.C. § 1464 by disseminating indecent material over the airwaves. Beginning with its adjudication of complaints arising from the broadcast of the Golden Globe Awards in 2002, the Commission instituted a change in its manner of dealing with "fleeting," i.e. unrepeated, expletives. During this broadcast, rock-musician Bono expressed delight over his receipt of an award by saying, "[T]his is really, really, fucking brilliant." In a lengthy tradition of previous FCC rulings, absence of repetition of an expletive had been virtually conclusive against finding an indecency violation. The staff therefore recommended in Bono's case, largely because the

expletive was unrepeated, that no violation be found. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19859, at ¶ 6 (Enforcement Bureau 2003). The Commission reversed the recommendation of its staff. Adopting a new altered standard, which diminished the significance of the fact that the potentially offensive expletive was not repeated, the Commission concluded that the broadcast of Bono's expletive constituted indecency in violation of § 1464. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, at ¶¶ 12, 17 (2004) ("*Golden Globes*").

The occurrences under review in this case followed soon after the Bono incident, during live broadcasts by Fox of Billboard Music Awards shows in 2002 and 2003. In the 2002 Billboard Music Awards, the actress and singer Cher, expressing triumphant delight upon her receipt of an award, said, "People have been telling me I'm on the way out every year, right? So fuck 'em." The incident during the 2003 Billboard Music Awards involved Nicole Richie and Paris Hilton, the co-stars of a serialized televised comedy show entitled, "The Simple Life," as presenters of awards. In "The Simple Life," Richie and Hilton play themselves as two spoiled, rich young women from Beverly Hills who cope with life on a farm. In joking reference to their own show, Richie said, "Why do they even call it 'The Simple Life?' Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." The Commission received complaints about each incident. Referring to its newly changed policy developed in response to the Bono incident in *Golden Globes*, the Commission found that the

two Billboard Music incidents were violations. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299 (2006) ("*Remand Order*"). Fox brought this action seeking to invalidate the Commission's rulings.

In adjudicating indecency complaints the Commission generally employs a context-based evaluation to determine whether the particular utterance is "*patently offensive* as measured by contemporary community standards." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C.R. 7999, at ¶ 8 (2001) ("*Industry Guidance*") (emphasis in original). Factors weighing in favor of a finding of indecency are: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*." *Industry Guidance*, at ¶ 10 (emphasis in original). Especially in relation to the "pandering" factor, a finding of violation is less likely if the broadcast of the utterance involved a genuine news report, or if censorship of the expletive would harm or distort artistic integrity. Prior to the Bono incident, the Commission attached great importance to the second factor, which focuses on whether an expletive was repeated. Under the pre-*Golden Globes* rulings, the fact that an utterance was fleeting was virtually conclusive in assuring it would not be deemed a violation (unless it breached special barriers, such as by referring to sexual activities with children). With its *Golden Globes* adjudication, however, the Commission adopted a less permissive stance. It announced that henceforth fleeting exple-

tives would be judged according to a standard more closely aligned with repeated utterances of expletives. Thus, the Commission has declared that it remains unlikely to find a violation in an expletive that is broadcast in the context of a genuine news report, or where censorship by bleeping out the expletive would compromise artistic integrity, but it will no longer give a nearly automatic pass merely because the expletive was not repeated. *See Remand Order*, at ¶ 23.

The Commission explained succinctly why lack of repetition of the F-Word would no longer result in a virtual free pass. "[W]e believe that, given the core-meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation. . . . The 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image." *Golden Globes*, at ¶¶ 8-9. "[A]ny use of that word has a sexual connotation even if the word is not used literally." *Remand Order*, at ¶ 16.

My colleagues find that in so altering its standards the Commission has acted illegally. They rule that the Commission failed to give a reasoned analysis explaining the change of rule. They accordingly find that the change of standard was arbitrary and capricious and therefore violated the Administrative Procedure Act. I disagree. In explanation of this relatively modest change of standard, the Commission gave a sensible, although not necessarily compelling, reason. In relation to the word "fuck," the Commission's central explanation for the change was essentially its perception that the "F-Word" is not only of extreme and graphic vulgarity, but also conveys an inescapably sexual connotation.

The Commission thus concluded that the use of the F-Word—even in a single fleeting instance without repetition—is likely to constitute an offense to the decency standards of § 1464.

The standards for judicial review of administrative actions are discussed in a few leading Supreme Court opinions from which the majority quotes. Agencies operate with broad discretionary power to establish rules and standards, and courts are required to give deference to agency decisions. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). A court must not "substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *see also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978) ("Administrative decisions should [not] be set aside . . . because the court is unhappy with the result reached."). In general, an agency's determination will be upheld by a court unless found to be "arbitrary and capricious." *See* 5 U.S.C. 706(2)(A).

An agency is free furthermore to change its standards. *See Chevron*, 467 U.S. at 863, 104 S. Ct. 2778 ("An initial agency interpretation is not instantly carved in stone."); *Huntington Hosp. v. Thompson*, 319 F.3d 74, 79 (2d Cir.2003) ("[A]n agency is not locked into the first interpretation of a statute it embraces."); *Ramaprakash*, 346 F.3d at 1125 ("Agencies are free to change course as their expertise and experience may suggest or require."). The Supreme Court has made clear that when an agency changes its standard or rule, it is "obligated

to supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 42, 103 S. Ct. 2856. If an agency without explanation were to make an adjudication which is not consistent with the agency's previously established standards, the troubling question would arise whether the agency has lawfully changed its standard, or whether it has arbitrarily failed to adhere to its standard, which it may not lawfully do.[15] Accordingly our court has ruled that "an agency . . . cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.'" *Huntington Hosp.*, 319 F.3d at 79. Such explanation, we have said, is necessary so that the reviewing court may "be able to understand the basis of the agency's action so that it may judge the consistency of that action with the agency's mandate." *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 129 (2d Cir. 1993). The District of Columbia Circuit has similarly reasoned that an agency's "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Ramaprakash*, 346 F.3d at 1125 (quotation marks omitted). In changing course, an agency must "provide a reasoned analysis indicating that prior policies and stan-

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[15] Judge Friendly noted:

> What gives concern is the manner, alas not atypical of the agencies, in which [a] change was made—slipped into an opinion in such a way that only careful readers would know what had happened, without articulation of reasons, and with prior authorities not overruled, so that the opinion writers remain free to pull them out of the drawer whenever the agency wishes to reach a result supportable by the old rule but not the new.

Henry J. Friendly, The Federal Administrative Agencies 63 (1962).

dards are being deliberately changed, not casually ignored." *Id.* at 1124 (quotation marks omitted).

In my view, in changing its position on the repetition of an expletive, the Commission complied with these requirements. It made clear acknowledgment that its *Golden Globes* and *Remand Order* rulings were not consistent with its prior standard regarding lack of repetition. It announced the adoption of a new standard. And it furnished a reasoned explanation for the change. Although one can reasonably disagree with the Commission's new position, its explanation—at least with respect to the F-Word—is not irrational, arbitrary, or capricious. The Commission thus satisfied the standards of the Administrative Procedures Act.

The Commission explained that the F-Word is "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language [whose] use invariably invokes a coarse sexual image." *Golden Globes*, at ¶ 9. In other words, the Commission found, contrary to its earlier policy, that the word is of such graphic explicitness in inevitable reference to sexual activity that absence of repetition does not save it from violating the standard of decency.

My colleagues offer several arguments in support of their conclusion that the Commission's explanation was not reasonable and therefore arbitrary and capricious. They argue (i) the Commission's position is irrational because of inconsistency resulting from the Commission's willingness to allow viewers to be subjected to a "first blow" if it comes in the context of a genuine news broadcast; (ii) the Commission's prediction that allowance of fleeting expletives will result in a great increase in their incidence is irrational because prior experience

was to the contrary; and (iii) the Commission is "divorced from reality" believing that the F-Word invariably invokes a sexual connotation. I respectfully disagree.

The majority argues that the Commission's change of standard is irrational because it is inconsistent. The opinion goes on to explain:

> [T]he Commission does not take the position that *any* occurrence of an expletive is indecent. . . . [T]he Commission will apparently excuse an expletive when it occurs during a "*bona fide* news interview". . . . The Commission even conceded that a rebroadcast of precisely the same offending clips of the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC. . . . [E]ven repeated and deliberate use of numerous expletives is not indecent . . . if the expletives are "integral" to the work [as in the case of the film "Saving Private Ryan"].

Majority op. at pages 458-59. The majority is of course correct that the Commission does not follow an all-or-nothing policy. Its standards do attempt to draw context-based distinctions, with the result that no violation will be found in circumstances where usage is considered sufficiently justified that it does not constitute indecency.

This, however, is in no way a consequence of the Commission's change of standard for fleeting expletives. It applies across the board to all circumstances. Regardless of whether the expletive was repeated or fleeting, the Commission will apply context-based standards to

determine whether the incident constituted indecency. A bona fide news context and recognition of artistic integrity favor a finding of no violation. The majority's criticism of inconsistency is not properly directed against the change of standard here in question, which has done nothing to increase the inconsistency. If anything, the change of standard has made the Commission more consistent rather than less, because under the new rule, the same context-based factors will apply to all circumstances. If there is merit in the majority's argument that the Commission's actions are arbitrary and capricious because of irrationality in its standards for determining when expletives are permitted and when forbidden, that argument must be directed against the entire censorship structure. It does not demonstrate that the Commission's change of standard for the fleeting expletive was irrational.

Furthermore, while the Commission will indeed allow the broadcast of the same material in some circumstances but not in others, I do not see why this differentiation should be considered irrational. It rather seeks to reconcile conflicting values. On the one hand, it recognizes, as stressed by the Supreme Court in *Pacifica*, the potential for harm to children resulting from exposure to indecency. On the other hand, the Commission has historically recognized that categorical prohibition of the broadcast of all instances of usage of a word generally considered indecent would suppress material of value, which should not be deemed indecent upon consideration of the context. This is not irrationality.[16] It is an

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[16] Spectators in the courtroom observing the argument of this case would have heard the judges and the lawyers saying "fuck" in open court. Had the case been on another subject, such usage would surely

attempt on the part of the Commission over the years to reconcile conflicting values through standards which take account of context.

The majority then argues that the Commission reasoned irrationally when in its *Remand Order*, as a part of its explanation for its change of position, the Commission observed:

> [G]ranting an automatic exemption for "isolated or fleeting" expletives . . . would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time. For example, broadcasters would be able to air . . . offensive . . . words, regardless of context, with impunity . . . provided that they did not air more than one expletive in any program segment.

Remand Order, at ¶ 25. The majority asserts that this concern was "divorced from reality." Majority op. at page 460. On the majority's view, because broadcasters did not "barrage[ ] the airwaves with expletives" during the period prior to *Golden Globes* when fleeting expletives received a free pass, they would not do so in the future.

The agency has one prediction of what would likely occur in the future under the pre-*Golden Globes* policy. The majority has another. The majority may be right in speculating that the Commission's concern is exaggerated. Who knows? As a matter of law, it makes no difference. The court is obligated to give deference to agency judgment and may not substitute its judgment

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have seemed inappropriate. Because of the issues in this case, the word was central to the issues being discussed. It is not irrational to take context into account to determine whether use of the word is indecent.

for that of the agency, or set aside an agency action merely because the court believes the agency is wrong. *See State Farm*, 463 U.S. at 43, 103 S. Ct. 2856 (court must not "substitute its judgment for that of the agency"); *Vermont Yankee*, 435 U.S. at 558, 98 S. Ct. 1197 ("Administrative decisions should [not] be set aside . . . because the court is unhappy with the result."). Only if the agency's action is "arbitrary and capricious" may the court nullify it. 5 U.S.C. § 706(2)(A).

Furthermore, if obligated to choose, I would bet my money on the agency's prediction. The majority's view presupposes that the future would repeat the past. It argues that because the networks were not flooded with discrete, fleeting expletives when fleeting expletives had a free pass, they would not be flooded in the future. This fails to take account of two facts. First, the words proscribed by the Commission's decency standards are much more common in daily discourse today than they were thirty years ago. Second, the regulated networks compete for audience with the unregulated cable channels, which increasingly make liberal use of their freedom to fill programming with such expletives. The media press regularly reports how difficult it is for networks to compete with cable for that reason.[17] It seems

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[17] *See, e.g.*, Gail Pennington, *Kingpin There Are More Things in Heaven and Earth Than "Sopranos," NBC Insists*, St. Louis Post-Dispatch, Feb. 2, 2003, at F1 ("Although they tried at first to feign indifference, broadcasters have seethed for years over the critical acclaim and abundant awards handed to cable series like 'The Sopranos.'" The complaint: "that the playing field isn't level. Broadcasters are strained by FCC rules about content—nudity and sex, violence and language—that don't apply to cable."); Jim Rutenberg, *Few Viewers Object as Unbleeped Bleep Words Spread on Network TV*, N.Y. Times, Jan. 25, 2003, at B7 ("Broadcast television, under intensifying attack by saltier cable

to me the agency has good reason to expect that a marked increase would occur if the old policy were continued.

In any event, even if the majority could reasonably label *this aspect* of the Commission's reasoning "arbitrary and capricious," it still would not matter. The agency's action in changing the standard for fleeting expletives did not depend on the defensibility of this prediction. It is at most a small part of the agency's justification for its action.

Finally the majority disagrees with the Commission's view that the word "fuck" communicates an "inherently . . . sexual connotation [and] invariably invokes a coarse sexual image." *Golden Globes*, at ¶¶ 8-9. The majority notes that the F-Word is often used in everyday conversation without any sexual meaning. Majority op. at page 459. I agree with the majority that the word is often used without a necessary *intention on the part of the speaker* to refer to sex. A student who gets a disappointing grade on a test, a cook who burns the roast, or a driver who returns to his parked car to find a parking ticket on the windshield, might holler out the F-Word to express anger or disappointment. The word is also sometimes used to express delight, as with Bono's exhilarated utterance on his receipt of his award. Some use it more as a declaration of uncompromising tough-

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competitors, is pushing the limits of decorum further by the year, and hardly anyone is pushing back."); Jim Rutenberg, *Hurt by Cable, Networks Spout Expletives*, N.Y. Times, Sept. 2, 2001, at 11 ("Broadcast television is under siege by smaller cable competitors that are winning audiences while pushing adult content. In that climate, broadcast is fighting the perception that its tastes are lagging behind those of a media-saturated culture whose mores have grown more permissive.").

ness, or of alignment on the side of vulgarity against prissy manners, without necessarily intending to evoke any sexual meaning. Some use it to intensify whatever it is they may be saying, and some sprinkle the word indiscriminately throughout their conversation with no apparent meaning whatsoever.

The majority, however, misunderstands the Commission's reasoning, or in any event interprets it in the manner least favorable to the Commission. In observing that *fuck* "invariably invokes a coarse sexual image," *Golden Globes*, at ¶ 9, that this is so "even if the word is not used literally," *Remand Order*, at ¶ 16, and that its power to offend "derives from its sexual . . . meaning," *id.* at ¶ 23, the Commission did not mean that every speaker who utters the word invariably intends to communicate an offensive sexual meaning. The Commission explicitly recognized that the word can be used in a manner that does not intend a sexual meaning. A fairer reading of the Commission's meaning is that, even when the speaker does not intend a sexual meaning, a substantial part of the community, and of the television audience, will understand the word as freighted with an offensive sexual connotation. It is surely not irrational for the Commission to conclude that, according to the understanding of a substantial segment of the community, the F-Word is never completely free of an offensive, sexual connotation. It is no accident that in many languages, the equivalent of the F-Word finds usage, as in English, to express anger, disgust, insult, and confrontation.

What we have is at most a difference of opinion between a court and an agency. Because of the deference courts must give to the reasoning of a duly authorized

administrative agency in matters within the agency's competence, a court's disagreement with the Commission on this question is of no consequence. The Commission's position is not irrational; it is not arbitrary and capricious.

I believe that in changing its standard, the Commission furnished a reasoned explanation, and thus satisfied the requirements of the Administrative Procedures Act.[18]

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[18] As each of the instances under review in this case involved the use of the F-Word, and because I find that the Commission has given a rational justification for its rule as applied to use of the F-Word, I do not consider the Commission's standard which makes it a decency violation to use the word "shit." In *Pacifica*, in upholding the constitutionality of censorship under § 1464, the Supreme Court stressed the accessibility of broadcasting to children. *See Pacifica*, 438 U.S. at 749, 98 S. Ct. 3026; *Remand Order*, at ¶ 51. The potential for harm to children resulting from indecent broadcasting was clearly a major concern justifying the censorship scheme. In this regard, it seems to me there is an enormous difference between censorship of references to sex and censorship of references to excrement. For children, excrement is a main preoccupation of their early years. There is surely no thought that children are harmed by hearing references to excrement.

Nicole Richie's script called for her to say it was not easy to get "pig crap" out of a Prada purse. In delivering the line, Richie changed "pig crap" to "cow shit." Had she stuck with "pig crap," that reference would not have been a violation, but her change to "cow shit" could have resulted in forfeitures and perhaps even the loss of Fox's license to broadcast. In another instance, the Commission found a violation (which was later vacated on other grounds) because someone was described as a "bullshitter." *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664 (2006); *Remand Order*, at ¶ 73. The justification is surely not that children will be harmed by hearing "shit" but not by hearing "crap." It appears that at least some of the Commission's prohibitions are not justified at all by the risk of harm to children but only by concern for good manners. When the censorship is exercised only to

I therefore respectfully dissent.[19]

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protect polite manners and not by reason of risk of harm, I question whether it can survive scrutiny. Because each instance of censorship at stake in this case involved the F-Word, which in the Commission's view inherently retains a sexual reference, the question does not arise in this case.

[19] I express neither agreement nor disagreement with my colleagues' added discussion of Fox's other challenges to the Commission's actions because, as the majority opinion recognizes, it is dictum and therefore not an authoritative precedent in our Circuit's law. In subsequent adjudications, the respect accorded to dictum depends on its persuasive force and not on the fact that it appears in a court opinion.

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

IN THE MATTER OF COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005

Released: Nov. 6, 2006
Adopted: Nov. 6, 2006

ORDER

By the Commission: Commissioner Adelstein concurring in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION

1. In this Order, we address complaints alleging that four television programs ("The 2002 Billboard Music Awards," "The 2003 Billboard Music Awards," "NYPD Blue," and "The Early Show") contained indecent and/or profane material.[1] After considering the comments submitted by broadcasters as well as other interested parties, we find that comments made by Nicole Richie during "The 2003 Billboard Music Awards" and by Cher during the "The 2002 Billboard Music Awards" are indecent and profane as broadcast but that the complained-of material aired on "The Early Show" is neither indecent nor profane. In addition, we dismiss on procedural grounds the complaints involving "NYPD Blue" as inadequate to trigger enforcement action.

II. BACKGROUND

2. On March 15, 2006, the Commission released Notices of Apparent Liability and a Memorandum Opinion and Order ("*Omnibus Order*") resolving numerous complaints that television broadcasts aired between February 2, 2002, and March 8, 2005, contained indecent, profane, and/or obscene material.[2] Section III.A of the *Omnibus Order* proposed monetary forfeitures against six

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[1] For purposes of this Order, we refer to all of the complained-about episodes of "NYPD Blue" as a single "program."

[2] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*"), *pets. for review pending, Fox Television Stations, Inc. v. FCC*, No. 06-1760-AG (2d Cir. filed Apr. 13, 2006), *remanded and partially stayed*, Sept. 7, 2006 ("*Remand Order*").

different television broadcasts for apparent violations of our prohibitions against indecency and/or profanity.[3] Section III.C addressed twenty-eight broadcasts that we concluded did not violate indecency, profanity, and/or obscenity restrictions for various reasons.[4] In the portion of the *Omnibus Order* at issue here, Section III.B, the Commission considered complaints filed against four programs.

3. "*The 2002 Billboard Music Awards.*" The Commission received a complaint concerning "The 2002 Billboard Music Awards" program that aired on Station WTTG(TV), Washington, DC, beginning at 8:00 p.m. Eastern Standard Time on December 9, 2002.[5] The complaint specifically alleged that during the broadcast Cher, an award winner, stated, "'People have been telling me I'm on the way out every year, right? So fuck 'em.'"[6]

4. "*The 2003 Billboard Music Awards.*" The Commission received a number of complaints about the "The 2003 Billboard Music Awards" program that aired on Fox Television Network stations beginning at 8:00 p.m. Eastern Standard Time on December 10, 2003.[7] The complaints concerned a segment in which Nicole Richie,

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[3] *Id.* at 2670-90 ¶¶ 22-99.

[4] *Id.* at 2700-20 ¶¶ 146-232.

[5] *Id.* at 2690 ¶ 101. *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

[6] *Id.* The Enforcement Bureau obtained a videotape of the broadcast that confirmed the allegation in the complaint. *Omnibus Order*, 21 FCC Rcd at 2690 ¶ 101.

[7] *Id.* at 2692 ¶ 112.

an award presenter, stated, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."[8]

5. "*NYPD Blue.*" The Commission received complaints concerning the use of the term "bullshit" in several "NYPD Blue" episodes that aired on KMBC-TV, Kansas City, Missouri, beginning at 9:00 p.m. Central Standard Time on various dates between January 14 and May 6, 2003.[9]

6. "*The Early Show.*" The Commission received a viewer complaint that Station KDKA-TV, Pittsburgh, Pennsylvania, licensed to CBS Broadcasting, Inc.

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[8] *Id.* at ¶ 112 and n. 164.

[9] *Id.* at 2696 ¶ 125. The Commission provided the following descriptions of the complained-of portions of the broadcasts:

> 1/14/03 episode (Det. Sipowitz in response to his partner's arrest by Internal Affairs): "Alright, this is Bullshit!"
>
> 2/4/03 episode (Det. Sipowitz to street officer regarding that officer's partner framing Sipowitz's partner): "Over time—over what—bullshit, a beef!"
>
> 2/18/03 episode (stated by a suspect who bragged about, but now denies, killing his daughter): "I told people I killed Samia to try and get respect back. She had ashamed me and my community look at me as a fool." Det. 1: "You took credit for killing your daughter?! Bullshit!"
>
> 4/15/03 episode (Det. harassing suspect who had harassed prosecutor): "I'm hoping this bullshit about you trying to get under ADA Haywood's skin is a misunderstanding."
>
> 5/6/03 episode (Captain to Det. who harassed suspect in 4/15 episode): "He said you nearly assaulted his client last night.' Det.: 'Well, that's a bunc[illegible] bullshit."

Id. at n. 187.

("CBS"), aired the word "bullshit" during "The Early Show" at approximately 8:10 a.m. Eastern Standard Time on December 13, 2004.[10] A videotape obtained from CBS showed that during a live interview with Twila Tanner, a contestant on the CBS program "Survivor: Vanuatu," Ms. Tanner referred to another contestant as a "bullshitter."[11]

7. In Section III.B of the *Omnibus Order*, the Commission found that the broadcasts at issue apparently violated the statutory and regulatory prohibitions against airing indecent and profane material.[12] In light of the circumstances, however, the Commission did not initiate forfeiture proceedings against the relevant licensees.[13] All of the broadcasts discussed in Section III.B, except for the "The Early Show," preceded the *Golden Globe Awards Order*,[14] in which the Commission

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[10] *Id.* at 2698-99 ¶ 137.

[11] *Id. See id.* at 2699 n.199 ("In commenting on the strategy employed by the fellow contestant, Ms. Tanner stated: 'I knew he was a bullshitter from Day One.' The interviewer, Julie Chen, recognized the inappropriateness of the language, stating: 'I hope we had the cue ready on that one . . . We can't say that word . . . There is a delay.'").

[12] *Id.* at 2690-2700 ¶¶ 100-45. *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999. However, with respect to complaints regarding the use of the words "dick" and "dickhead" in episodes of "NYPD Blue," the Commission found that in context the broadcasts of these terms were not patently offensive under its contextual analysis and based on FCC precedent. *Omnibus Order*, 21 FCC Rcd at 2696-97 ¶ 127.

[13] *Omnibus Order*, 21 FCC Rcd at 2690 ¶ 100.

[14] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), review granted, 19 FCC Rcd 4975, 4981 ¶¶ 13-14 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending.*

made clear that the isolated use of an offensive expletive could be actionably indecent.[15] The FCC also stated that its precedent at the time of "The Early Show" broadcast "did not clearly indicate that the Commission would take enforcement action against an isolated use" of "shit" (the "S-Word") or its variants.[16] Accordingly, consistent with its commitment to proceed with caution and restraint in this area, the Commission decided that it would not take any adverse action against any licensee as a result of these apparent violations.[17]

8. Following release of the *Omnibus Order*, several parties petitioned for judicial review of Section III.B, asserting a variety of constitutional and statutory challenges. Fox Television Stations, Inc. ("Fox") and CBS filed a joint petition for review in the United States Court of Appeals for the Second Circuit.[18] ABC Television Network ("ABC") and Hearst-Argyle Television, Inc. ("Hearst") filed a joint petition for review in the United States Court of Appeals for the D.C. Circuit, which later transferred the petition to the Second Circuit. The Second Circuit consolidated the petitions on June 14, 2006.[19]

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[15] *See Omnibus Order*, 21 FCC Rcd at 2692 ¶ 111, 2695 ¶ 124, 2698 ¶ 136.

[16] *Id.* at 2700 ¶ 145.

[17] *Id.* at 2690 ¶ 100.

[18] *See supra* n. 2 (noting pending petitions for review).

[19] The Second Circuit also granted motions to intervene in the Fox-CBS case by NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates Association, and the Center for Creative Community, Inc. Before transferring the ABC-Hearst case, the D.C. Circuit granted ABC Television Affiliates Association's motion to intervene.

9. At the same time, several parties complained to the Commission about the process the Commission followed in formulating Section III.B of the *Omnibus Order*. The Commission ordinarily provides broadcasters with an opportunity to file responses and raise arguments before imposing forfeiture liability.[20] With one exception, however, the FCC did not seek the views of the licensees affected by Section III.B of the *Omnibus Order* because the Commission did not impose any sanctions on them.[21] Following the release of the *Omnibus Order*, broadcasters complained that they should have had an opportunity to present their views before the Commission reached its decisions in Section III.B. Upon reflection, the Commission agreed and stated that it wanted to ensure that all of the affected licensees were afforded a full opportunity to be heard before the Commission issued a final decision with respect to the broadcasts at issue. Accordingly, on July 5, 2006, the Commission asked the Second Circuit for a voluntary remand of the case and stay of the briefing schedule. The Commission asked the court to remand the case for 60 days in order to afford interested parties an opportu-

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[20] *See* 47 U.S.C. § 503(b)(4)(A); *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8015-16 ¶¶ 26-27 (2001) ("*Indecency Policy Statement*").

[21] The Commission did send a narrow Letter of Inquiry ("LOI") regarding "The 2003 Billboard Music Awards" broadcast, receiving a limited response from Fox on January 30, 2004. Fox also responded to a supplemental LOI without presenting new legal arguments. The Commission did not send LOIs regarding the complained-of broadcasts of "The 2002 Billboard Music Awards," "NYPD Blue," and "The Early Show" prior to the court's remand.

nity to file responses and the Commission an opportunity to give the issues further consideration.

10. The Second Circuit granted the Commission's motion on September 7, 2006, remanding for a period of 60 days "for the entry of a further final or appealable order of the FCC following such further consideration as the FCC may deem appropriate in the circumstances."[22] On the same day, the Commission announced a two-week filing period for interested parties wishing to submit comments concerning the four cases.[23] The Enforcement Bureau separately issued Letters of Inquiry ("LOIs") to Fox, CBS, and KMBC Hearst-Argyle Television, Inc. on September 7, 2006, and to those broadcasters as well as other parties to the Second Circuit proceeding on September 18, 2006.

III. DISCUSSION

11. Consistent with our commitment to consider the comments and LOI responses filed following the Second Circuit's *Remand Order* and to take a fresh look at the issues raised by the four programs at issue on remand, we vacate Section III.B of the *Omnibus Order* in its entirety and replace it with the decisions below.

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[22] *Remand Order* at 2.

[23] *See* Public Notice, *FCC Announces Filing Procedures In Connection With Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006).

A. "The 2003 Billboard Music Awards"

12. *The Programming.* The Commission, Fox, stations licensed to Fox or its affiliated companies, and affiliates of the Fox Television Network all received a number of complaints from individual viewers and organizations alleging that Fox stations aired indecent material during "The 2003 Billboard Music Awards" program on December 10, 2003 between 8 p.m. and 10 p.m. Eastern Standard Time.[24] The complainants alleged that Nicole Richie, who with Paris Hilton presented an award on the program, uttered language that was indecent and profane in violation of 18 U.S.C. § 1464 and the Commission's rule restricting the broadcast of indecent material. The complainants requested that the Commission impose sanctions against each station that aired the remarks.

13. The Bureau sent Fox a letter of inquiry on January 7, 2004.[25] Fox responded on January 30, 2004, attaching a transcript of the material at issue.[26] According to Fox, the program announcer introduced Paris Hilton and Nicole Richie, stars of the Fox Television Network show "The Simple Life,"[27] as follows: "To pre-

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[24] FCC File Nos. EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091.

[25] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc. (January 7, 2004).

[26] *See* Letter from John C. Quale, Counsel, Fox Television Stations, Inc., to Investigations and Hearings Division, Enforcement Bureau, FCC, File No. EB-03-IH-0617 (January 30, 2004) ("*Response*").

[27] "The Simple Life," which debuted on December 2, 2003, followed Ms. Hilton's and Ms. Richie's fish-out-of-water adventures upon being transplanted from Beverly Hills, California to an Arkansas farm for 30 days. A *New York Times* review described the show as "[a]n updated

sent the award for Top 40 Mainstream Track, here are two babes whose lives are anything but mainstream. From their hit TV series, 'The Simple Life,' please welcome Nicole Richie and Paris Hilton." Following that introduction, Paris Hilton and Nicole Richie walked onstage to present the award. Fox-owned stations and Fox affiliates in the Eastern and Central Time Zones then broadcast the following exchange between them:

Paris Hilton:	Now Nicole, remember, this is a live show, watch the bad language.
Nicole Richie:	Okay, God.
Paris Hilton:	It feels so good to be standing here tonight.
Nicole Richie:	Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow shit

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'Green Acres'" featuring "Ms. Hilton, 22, of the hotel fortune, and Ms. Richie, also 22, daughter of the pop singer Lionel Richie." Alessandra Stanley, *With a Rich Girl Here and a Rich Girl There*, N.Y. Times, Dec. 2, 2003, at E1. The cover of the Simple Life DVD describes Ms. Hilton and Ms. Richie in the following manner: "They're Rich. They're Sexy. They're TOTALLY-OUT-OF-CONTROL!" Discussing Fox executives' original idea for the show in an interview, one executive touched on the same excretory theme as "The 2003 Billboard Awards" script, stating that "'[t]hey wanted to see stilettos in cow shit.'" *http://web.archive.org/web/20040215040316/http://www.tvweek.com/topstorys/112403simplelife.html.* Daily Variety's review of the premiere episode also described Ms. Richie's penchant for "bad language," labeling her as "potty-mouthed." Brian Lowry, *The Simple Life*, Daily Variety, Nov. 25, 2003 at 4.

> out of a Prada purse? It's not so fucking simple.[28]

14. Fox contends that this broadcast was not actionably indecent. Although Fox concedes that it broadcast the F-Word, it argues that the word, in context, did not depict or describe sexual activities but rather, "at most," was a "vulgar expletive used to express emphasis," and thus is outside the scope of the Commission's indecency definition.[29] As for the use of the S-Word, Fox does not deny that it was used in the excretory sense. It argues, however, that the dialogue "contained at most a passing reference to an excretory by-product (i.e., 'cow shit') and an expletive used for emphasis," that the dialogue lasted only 22 seconds, and that it was not pandering, titillating or shocking.[30] Therefore, Fox contends that the dialogue is not actionably indecent.

15. *Indecency Analysis.* The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.[31] Thus, indecency findings require two primary determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency defi-

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[28] *See Response* at 3-4.

[29] *Id.* at 12-13.

[30] *Id.*

[31] *Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (*citing Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

nition—that is, the material must describe or depict sexual or excretory organs or activities. Second, the material must be patently offensive as measured by contemporary community standards for the broadcast medium.[32] In our assessment of whether broadcast material is patently offensive, "the full context in which the material appeared is critically important."[33] Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length the descriptions; and (3) whether the material panders to, titillates or shocks the audience.[34] In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly other, factors."[35] In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[36]

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[32] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 8 (emphasis in original); *see Omnibus Order*, 21 FCC Rcd at 2667 ¶ 12.

[33] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

[34] *Id.* at 8002-15 ¶¶ 8-23.

[35] *Id.* at 8003 ¶ 10.

[36] *Id.* at 8009 ¶ 19 (*citing Tempe Radio, Inc. (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (same)).

or, alternatively, removing the broadcast material from the realm of indecency.[37]

16. With respect to the first determination, Fox does not dispute that Ms. Richie's comment—"Have you ever tried to get cow shit out of a Prada purse?"—refers to excrement, and we conclude that it is clearly within the scope of our indecency definition. Fox does contend that Ms. Richie's use of the "F-Word"—in the statement "[i]t's not so fucking simple"—does not describe sexual activities and thus falls outside the scope of our indecency definition, but we disagree. A long line of precedent indicates that the use of the "F-Word" for emphasis or as an intensifier comes within the subject matter scope of our indecency definition.[38] Given the core

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[37] *Indecency Policy Statement*, 16 FCC Rcd at 8010 ¶ 20 ("the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding").

[38] *See, e.g., Grant Broadcasting System II, Inc. Licensee WJPR-TV*, 12 FCC Rcd 8277, 8279 (Mass Media Bur. 1997) (NAL issued for non-literal uses of the "F-Word" and the "S-Word," such as "this fucking place is going to blow up"); *Pacifica Foundation, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 ¶¶ 12-13 (1987) (subsequent history omitted) (distinguishing between the use of "expletives" and "speech involving the description or depiction of sexual . . . functions" but indicating that both fall within the subject matter scope of our indecency definition). The Enforcement Bureau's departure from this precedent in its *Golden Globe Awards* decision, *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards,"* Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), was contrary to this precedent and thus appropriately overturned by the Commission. While the Bureau cited two cases for the proposition that the use of the "F-Word" did not necessarily fall within the subject matter scope of our indecency definition, both cases were inapposite. First, the "F-Word" was not even an issue in *Entercom*, which addressed the words "prick" and "piss," and, in any event,

meaning of the "F-Word," any use of that word has a sexual connotation even if the word is not used literally. Indeed, the first dictionary definition of the "F-Word" is sexual in nature.[39] Moreover, it hardly seems debatable that the word's power to "intensify" and offend derives from its implicit sexual meaning.[40] Accordingly, we conclude that, as we stated in *Golden Globe*,[41] its use inherently has a sexual connotation and thus falls within the scope of our indecency definition. The material thus warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards for the broadcast medium. Looking at the three principal factors in our contextual analysis, we conclude that it is.

17. We will first address the first and third principal factors in our contextual analysis—the explicitness or graphic nature of the material and whether the material panders to, titillates, or shocks the audience. The com-

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was a Bureau rather than a Commission decision. *See Entercom Buffalo License, LLC (WGR(AM))*, Order, 17 FCC Rcd 11997 (Enf. Bur. 2002). Second, in *Peter Branton*, the Commission did not rule that the some uses of the "F-Word" fell outside the subject matter scope of our indecency definition. Rather, we decided that the uses of the "F-Word" there were not "patently offensive" in the context of the news programming at issue in that case. *See Peter Branton*, 6 FCC Rcd 610 (1991), *appeal dismissed*, 993 F.2d 906 (D.C. Cir. 1993), *cert. den.* 511 U.S. 1052 (1994).

[39] *See, e.g.*, American Heritage College Dictionary 559 (4th ed. 2002) (defining the F-Word as "1: to have sexual intercourse with").

[40] *See* Robert F. Bloomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell)*, 40 Santa Clara L. Rev. 65, 98 (1999) ("all F-word usage has at least an implicit sexual meaning").

[41] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 8.

plained-of material is quite graphic and explicit. Ms. Richie's comment referring to excrement conveys a graphic image of Ms. Richie trying to scrape cow excrement out of her designer hand bag. Because of her use of the "S-Word," Ms. Richie's description also contained quite vulgar language. Furthermore, the vulgar description of excrement was coupled with the use of the "F-Word." As we have previously concluded, the "F-Word" is one of the most vulgar, graphic, and explicit words for sexual activity in the English language.[42] Here, Ms. Richie's use of the "F-Word" coupled with her graphic and explicit description of the handling of excrement during a live broadcast of a popular music awards ceremony when children were expected to be in the audience was vulgar and shocking.[43] Her comments were also presented in a pandering manner. As part of their dialogue, Ms. Hilton reminded Ms. Richie to "watch the bad language," a comment that served to preview and highlight for the viewing audience Ms. Richie's remarks.

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[42] *See id.*

[43] To the extent that Fox argues that it did not present Ms. Richie's comment for "shock value," *see, e.g., Response* at 13, it fundamentally misunderstands the contextual analysis employed by the Commission. "In evaluating whether material is indecent, we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster." *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Order on Reconsideration, 21 FCC Rcd 6653, 6657-58 ¶ 12 (2006) ("*Super Bowl Order on Reconsideration*"), *pet. for review pending, CBS Corp. v. FCC*, No. 06-3575 (3d Cir. filed July 28, 2006).

Moreover, Fox does not argue that there was any justification for Ms. Richie's comments.[44]

18. We note that when the Supreme Court stressed the importance of context in *Pacifica*, it mentioned as relevant contextual factors the time of day of the broadcast, program content as it affects "the composition of the audience," and the nature of the medium.[45] All of these factors support the conclusion that the dialogue here was patently offensive in context. The complained-of material was broadcast early in prime time. The program's content was, as discussed above, graphic, explicit and vulgar, both in its excretory description and its use of the "F-Word." The program was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars. Although there is no requirement that we document the presence of children in the audience for a program that is subject to an indecency complaint and is aired between 6 a.m. and 10 p.m.,[46] we note that in this case a significant portion of the viewing audience for this program was under 18. According to Nielsen ratings data, during an average minute of "The 2003 Billboard Music Awards" broadcast, 2,312,000 (23.4%) of the 9,871,000 people watching the program were under 18,

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[44] For example, Fox does not argue that Ms. Richie's remarks had any artistic merit or were necessary to convey any message.

[45] *See Pacifica*, 438 U.S. at 749-51.

[46] *See Action for Children's Television* v. *FCC*, 58 F.3d 654, 665 (D.C. Cir. 1995) (en banc) ("*ACT III*") (holding that the Commission could rely on bright-line time channeling rule and rejecting contention that it was required to use "station-specific and program-specific data in assessing whether children are at risk of being exposed to broadcast indecency"), *cert. denied*, 516 U.S. 1072 (1996).

and 1,089,000 (11%) were between the ages of 2 and 11. In addition, we note that this program was rated TV-PG(DL). Such a rating would *not* have put parents or others on notice of such vulgar language, and the broadcast contained no other warnings to viewers that it might contain material highly unsuitable for children.[47] This no doubt helps explain the strong feelings that many of the complainants, particularly those who were watching the program with their children, expressed

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[47] Fox notes that its policy is to rate any programming containing the "F-Word" TV-MA. *See* Letter from John C. Quale to Marlene H. Dortch, Secretary, FCC, in FCC File Nos. EB-03-IH-0460, EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091 at 4 (filed Sept. 29, 2006) ("Fox Response to 9/18/2006 LOI"). The TV-MA rating (mature audience only) signifies that the program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17. In the context of a TV-MA rated program, an "L" would signify "crude indecent language." The TV-PG rating (parental guidance suggested), by contrast, merely signifies that the program contains material that parents may find unsuitable for younger children, and that parents may want to watch the program with their younger children. TV-PG is the most common rating, covering a majority of the programs that are rated. *See* Nancy Signorielli, *Age-Based Ratings, Content Designations, and Television Content: Is There a Problem?*, 8 Mass Comm. & Soc'y 277, 293 (2005) (six in ten rated programs are rated TV-PG). The "D" signifies that the program may contain some suggestive dialogue, and the "L" signifies that the program may contain some infrequent coarse language. Moreover, we note that the TV-PG(DL) rating appeared only at the beginning and once in the middle of the program; thus, a viewer tuning into this 2-hour broadcast at another time may not even have been aware that it was rated TV-PG(DL). *See Pacifica*, 438 U.S. at 748 ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.").

regarding the unexpectedly vulgar content.[48] In light of all of these factors, we conclude that the first and third factors in our contextual analysis both weigh heavily in favor of a finding that the material is patently offensive.

19. With respect to the second factor in our contextual analysis—whether the complained-of material was sustained or repeated—Fox argues that the dialogue

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[48] *See, e.g.*, e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 10, 2003 ("I would appreciate it if you would pass on my intense opinion of the Billboard Awards and Nicole Ritchie (sic). We teach our kids that people like her have a potty mouth. My children were watching part of this program and happened to catch her vulgarity. We will not finish watching the awards nor will we continue to watch fox network in this household."); e-mail complaint from individual to Fox station WTVT(TV), Tampa, dated January 21, 2004 ("Fox insults my ears and those of my wife and children with the "f' word, etc. and we leave you for good . . ."); e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 10, 2003 ("Why are you allowing that kind of language at 8:00 p.m. for all ages of people to hear? . . . It was disgusting and very disturbing . . ."); e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 13, 2003 ("I was watching the event with my 12 and 13 y/o daughters . . . the amount of swearing that was done and the severity of some of the words was horrible . . . Watching TV has become very unpredictable these days . . . I do not feel it is a safe source of entertainment for our children. . . ."); complaint from individual to David Solomon, Chief of Enforcement Bureau, dated December 12, 2003 ("I was horrified to learn that some of the young children in the school that I teach in viewed the program. Several of these children are among those children who have social problems and are often in trouble. Is this what our children have to look toward for example on how to live? Would you want your children or grandchildren to mimic these entertainers ?????") All of these complaints except for the last one to the FCC's Enforcement Bureau are attached to Fox's January 30, 2004 *Response*.

here was a "fleeting and isolated utterance" and that such material is not actionably indecent.[49] We disagree.

20. Fox's argument that a "fleeting and isolated utterance" is not actionably indecent is based largely on staff letters and dicta in decisions predating the Commission's *Golden Globe Awards Order*. For example, in a 1987 decision clarifying that our indecency definition was not restricted only to the seven words contained in the George Carlin monologue determined to be indecent in *Pacifica*, the Commission distinguished in dicta between "expletives"—words such as the "F-Word" or the "S-Word" used outside of their core sexual or excretory meanings—and descriptions of sexual or excretory functions. And, in so doing, the Commission suggested: "If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."[50] The Commission made clear, however, that repetition was *not* required when speech "involv[es] a description or depiction of sexual or excretory functions" and that "[t]he mere fact that specific words or phrases are not *repeated* does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[51] In this case, Ms. Richie's use of the "S-Word" clearly involved "a description of excretory functions."[52]

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[49] *Response* at 12, 13.

[50] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699. *See also New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, Public Notice, 2 FCC Rcd 2726 (1987).

[51] *See Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699 (emphasis added).

[52] *Id.*

21. Subsequent to this 1987 guidance, there were several Bureau-level decisions finding the isolated use of an expletive not to be actionably indecent.[53] In no case, however, did the Commission itself, when evaluating an actual program, find that the isolated use of an expletive, such as the "F-Word," as broadcast was not indecent or could not be indecent. In our 2001 *Indecency Policy Statement*,[54] we explained that "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency,"[55] but also noted "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness."[56] Then, in 2004, the Commission itself considered for the first time in an enforcement action whether a single use of an expletive could be indecent. And in evaluating the broadcast of the F-Word during "The Golden Globe Awards," we overturned the Bureau-level decisions holding that an isolated expletive could not be indecent and disavowed our 1987 dicta on which those decisions were based.

22. While it is important to understand the history of the Commission's decisions in this area, we reject Fox's suggestion that Nicole Richie's comments would not have been actionably indecent prior to our *Golden*

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[53] *See, e.g., Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 12 n. 32 (listing Bureau-level decisions).

[54] *Indecency Policy Statement*, 16 FCC Rcd at 8008-09 ¶¶ 17-19.

[55] *Id.* at 8008 ¶ 17.

[56] *Id.* at 8009 ¶ 19.

Globe decision.[57] Rather, Ms. Richie's remarks would have been actionably indecent prior to our *Golden Globe* decision for three separate reasons. First, even under our pre-*Golden Globe* dicta, the offensive material here does not consist solely of the use of expletives; as discussed above, the "S-Word" was used here in its excretory sense and was integral to a graphic and vulgar description that clearly falls within the scope of our indecency rule. As we stated in our 1987 guidance, "repetitive use" was not required under such circumstances.[58] Second, the offensive language was "repeated" in that it included not one but two extremely graphic and offensive words. Third, there seems to be little doubt that Ms. Richie's comments were deliberately uttered and that she planned her comments in advance.[59] Ms. Hilton's opening remark to Ms. Richie that this was a live show and she should "watch the bad language" strongly suggests that the offensive language that followed was not spontaneous. Further, there is nothing in Ms. Richie's confident and fluid delivery of the lines, and her use of multiple offensive words, that suggests that any of the language was a spontaneous slip of the tongue. Thus, given the presence of a graphic description of excretory functions, the presence of multiple of-

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[57] In this respect, our decision differs from our suggestion in Section III.B of the *Omnibus Order*, now vacated, that prior to the Commission's decision in *Golden Globe* this broadcast would not have warranted enforcement action because it involved an "isolated use of expletives." *See Omnibus Order*, 21 FCC Rcd at 2695 ¶ 124. For the reasons discussed above, we do not believe that our prior suggestion accurately reflected the context of this broadcast or Commission precedent.

[58] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699.

[59] *See id.* (discussing "deliberate" use of expletives).

fensive words, and the deliberate nature of Ms. Richie's comments, we conclude that this broadcast would have been actionably indecent consistent with prior Commission guidance even in the absence of our *Golden Globe* decision.[60]

23. In addition, this broadcast is actionably indecent under the *Golden Globe Awards Order*.[61] In that Order, we stated that the "mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[62] While, as explained above, Commission dicta and Bureau-level decisions issued before *Golden Globe* had suggested that expletives had to be repeated to be indecent but "descriptions or depictions of sexual or excretory functions" did not need to be repeated to be indecent, we believe that this guidance was seriously flawed. We thus reaffirm that it was appropriate to disavow it. To begin with, any strict dichotomy between "expletives" and "descriptions or depictions of sexual or excretory functions" is artificial and does not make sense in light of the

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[60] For these reasons, Ms. Richie's comments differ significantly from the language involved in the two Bureau-level decisions finding fleeting expletives not to be indecent that were cited in the *Indecency Policy Statement*. *See Indecency Policy Statement*, 16 FCC Rcd at 8008-09 ¶ 18. Rather, they are more similar to the material in the *LBJS Broadcasting Company* Notice of Apparent Liability cited in the *Indecency Policy Statement* because they combine a graphic and vulgar description of sexual or excretory material with an expletive. *Id.* at 8009 ¶ 19, *citing LBJS Broadcasting Company*, 13 FCC Rcd 20956 (Mass Media Bur. 1998) (forfeiture paid) (finding broadcast apparently indecent for use of phrase "[s]uck my dick you fucking cunt").

[61] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12.

[62] *Id.*

fact that an "expletive's" power to offend derives from its sexual or excretory meaning.[63] Indeed, this is why it has long been clear that such words fall within the subject matter scope of our indecency definition, which since *Pacifica* has involved the description of sexual or excretory organs or activities.[64] Moreover, in certain cases, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions. Finally, and perhaps most importantly, categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context.[65] In evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination.[66] To the extent that Commission dicta had previously suggested that one of these factors—whether material had been repeated— would always be decisive in a certain category of cases, we believe that such dicta was at odds with the Commission's overall enforcement policy and was appropriately disavowed.

24. Turning back to "The 2003 Billboard Music Awards" broadcast, we believe that we need not ignore "the first blow" to the television audience in the circumstances presented here.[67] Nor do we think that *Pacifica* requires that approach. The major broadcast networks

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[63] *See supra* para. 16.

[64] *Pacifica*, 438 U.S. at 742.

[65] *Indecency Policy Statement*, 16 FCC Rcd at 8002-03 ¶ 9.

[66] *Id.* at ¶¶ 9-10.

[67] *Pacifica*, 438 U.S. at 748-49.

("Networks") argue that the *Pacifica* Court "would have never approved" an indecency enforcement regime that applied to isolated and fleeting expletives.[68] But this claim finds no support in *Pacifica*, in which the Court specifically reserved the question of "an occasional expletive" and noted that it addressed only the "particular broadcast" at issue in that case.[69] Indeed, we think it significant that the "occasional expletive" contemplated by the Court was one that occurred in "a two-way radio conversation between a cab driver and a dispatcher,"—a conversation not broadcast to a wide audience—"or a telecast of an Elizabethan comedy," settings far removed from the broadcast at issue here.[70]

25. In explaining the special nature of the broadcast medium, the Supreme Court emphasized the "pervasive presence [of the broadcast medium] in the lives of all Americans" and that indecent broadcasts invade the privacy of the home. It rejected the argument that one could protect oneself by turning off the broadcast upon hearing indecent language: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[71] We believe that granting an automatic exemption for "isolated or fleeting" expletives unfairly forces viewers (including children) to take "the first blow." Indeed, it would as a

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[68] Joint Comments of Fox, CBS, NBC Universal, Inc. and NBC Telemundo License Co. in DA 06-1739 at 3 (filed Sept. 21, 2006) ("*Joint Comments*").

[69] *Pacifica*, 438 U.S. at 742, 750.

[70] *Id.* at 750.

[71] *Id.* at 748-49.

matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time. For example, broadcasters would be able to air any one of a number of offensive sexual or excretory words, regardless of context, with impunity during the middle of the afternoon provided that they did not air more than one expletive in any program segment.[72] Such a result would be inconsistent with our obligation to enforce the law responsibly. We do not believe that viewers of free television broadcasts utilizing the public airwaves should feel, as so many of the complaining viewers of "The 2003 Billboard Music Awards" clearly do, that they cannot safely allow their families to watch prime-time broadcasts.[73]

26. Nor, as discussed above, are the Networks correct in their suggestion that fleeting utterances have never before been regulated. On the contrary, our *Golden Globe Awards* decision was not the first time that a fleeting utterance had been found to be indecent.[74] We have long recognized that "even relatively fleeting references may be found indecent" if the context makes them patently offensive.[75]

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[72] Such words could include grossly offensive sexual terms such as "cunt."

[73] *See* complaints listed in note 48 *supra*. Like the broadcast in *Pacifica*, Ms. Richie's statements "could have enlarged a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 749.

[74] *Indecency Policy Statement*, 16 FCC Rcd at 8009 ¶ 19.

[75] *See id.* (listing examples of isolated utterances found to be actionably indecent).

27. We thus conclude that the fact that the offensive dialogue here was relatively brief is not dispositive under these particular circumstances. This is not a case involving a single, spontaneously uttered expletive. Rather, it was two sentences, one of which contained a graphic excretory description and the other a vulgar expletive used to heighten the effect of the excretory description. And, as noted above, these statements were not spontaneous slips of the tongue, but rather were planned by the speaker and presaged by the introductory remark to "watch the bad language."

28. With respect to our analysis of the complained-of material, we emphatically reject the argument made by Fox and other broadcasters that the "contemporary community standards" employed by the Commission merely reflect the "subjective opinions" or "the tastes of the individuals with seats on the Commission."[76] Rather, as we have previously stated, in evaluating material, we rely on the Commission's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens."[77]

29. In this case, moreover, our assessment of contemporary community standards for the broadcast medium is strongly bolstered by broadcasters' own practices. As mentioned above, during the 10:00 p.m.-6:00 a.m. "safe harbor," broadcasters are permitted to air indecent and profane material. Nevertheless, with rare exceptions, they do not allow the "F-Word" or the "S-

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[76] *Joint Comments* at 10-11.

[77] *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 ¶ 12 (2004).

Word" to be broadcast during that time period. Fox, for example, "generally prohibit[s] use of any form of the F-word or S-word during any day part, *including late-night programming*."[78] NBC also "does not broadcast the 'F-Word' and the 'S-Word'" during the "safe harbor" "except in unusual circumstances" and generally does not allow such language to be broadcast on its flagship late-night program "The Tonight Show with Jay Leno."[79] Similarly, ABC, even during safe harbor hours, "generally has not approved the broadcast of the 'f-word' and the 's-word.'"[80] For instance, during a recent broadcast of "Nightline," ABC deleted uses of the "F-Word" in a piece on actor Mark Wahlberg.[81] CBS, likewise, indicates that "[g]enerally speaking, broadcast[s] of the 'F-word' and 'S-word' are not permitted under CBS's Television Network Standards *at any time of [the] day*."[82] Hearst also reports that its general policy, "which applies *at all times*, is that vulgar language such as the F-Word and the S-Word [is] not to be knowingly broad-

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[78] Fox Response to 9/18/2006 LOI at 4 (emphasis added).

[79] Letter from F. William LeBeau to Marlene H. Dortch, Secretary, FCC, File Nos. EB-03-IH-0355, EB-03-IH-0460, EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091, EB-05-IH-0007 at 4-5 (Sept. 29, 2006) ("NBC Response to 9/18/2006 LOI").

[80] Letter from John W. Zucker, Senior Vice President, ABC, Inc. to Marlene H. Dortch, Secretary, FCC, File No. EB-03-IH-0355 at 2 (Sept. 29, 2006) ("ABC Response to 9/18/2006 LOI").

[81] "Nightline," Sept. 29, 2006.

[82] Letter from Anne Lucey, Senior Vice President, CBS Corp. to Marlene H. Dortch, Secretary, FCC, File No. EB-05-IH-0007 at 2 (Sept. 29, 2006) ("CBS Response to 9/18/2006 LOI") (emphasis added).

cast."[83] To be sure, each of the broadcasters avers that in certain contexts, such as the motion picture *Saving Private Ryan*, they do permit the broadcast of the "F-Word" and the "S-Word." However, none of these examples bears even the slightest resemblance to Nicole Richie's comments during "The 2003 Billboard Music Awards."[84] Indeed, in Congressional testimony, Fox's President of Entertainment recognized that the very comments at issue here—Ms. Richie's remarks—contained "inappropriate language."[85] Moreover, Fox edited out her comments in its broadcasts to the Mountain and Pacific Time Zones.

30. Taken as a whole, broadcasters' practices with respect to programming aired during the safe harbor reflect their recognition that airing the "F-Word" and the "S-Word" on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium. They also reinforce our conclusion that Nicole Richie's comments during "The 2003 Billboard Music Awards" were patently offensive under contemporary community standards. For all of these reasons, we conclude that, given the explicit, graphic,

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[83] Response of Hearst-Argyle Television, Inc., File No. EB-03-IH-0355 at 3 (Sept. 29, 2006) ("Hearst Response to 9/18/2006 LOI") (emphasis added).

[84] *See* ABC Response to 9/18/2006 LOI at 2; CBS Response to 9/18/2006 LOI at 2-3; Hearst Response to 9/18/2006 LOI at 4-5; NBC Response to 9/18/2006 LOI at 3-4; Fox Response to 9/18/2006 LOI at 4.

[85] *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. on Energy & Commerce*, 107th Congress, (Feb. 26, 2004) (statement of Gail Berman).

vulgar, and shocking nature of Ms. Richie's comments, they were patently offensive under contemporary community standards for the broadcast medium and thus indecent as broadcast.[86]

31. We also disagree that it would be inequitable to hold Fox responsible for airing offensive language during "The 2003 Billboard Music Awards" due to the live, unscripted nature of the material.[87] In disclaiming responsibility, Fox states that Nicole Richie's and Paris Hilton's scripted dialogue did not contain the "F-Word" or "S-Word." Rather, Ms. Richie's first scripted line read: "Yeah—instead of standing in mud and pig crap." When she spoke, she substituted "cow shit" (which was blocked out in the audio feed) for "pig crap" in that line. In the sentences at issue here, Ms. Richie was scripted to say "Have you ever tried to get cow manure out of a Prada purse? It's not so freaking simple."[88]

32. Fox also describes the measures it employed to delete objectionable material from the broadcast. It says that as in previous years—including during "The 2002 Billboard Music Awards" broadcast when it aired Cher's use of the phrase "fuck 'em"—it utilized a five-second delay that it normally used during the production of live entertainment programming. A Broadcast Standards

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[86] The Networks also complain about the Commission's analysis of contemporary community standards in other pending proceedings, such as *The Blues: Godfathers and Sons*. *See Joint Comments* at 10. In the case of *The Blues*, the Commission has issued only a Notice of Apparent Liability for Forfeiture, *see Omnibus Order* at 2683-87 ¶¶ 7285, and we will address such issues in further proceedings in that case.

[87] *See Response* at 13.

[88] *Id.* at 6.

employee monitored the broadcast and operated a "delay button" that enables an employee to edit out objectionable content before it airs. Fox also assigned a Broadcast Standards representative to the event to review the script, attend dress rehearsals and be present at the event, as it normally did for the production of live entertainment events. During "The 2003 Billboard Music Awards" program, the employee operating the delay button edited out the vulgar phrase "cow shit" the first time Ms. Richie said it, but failed to edit out the remaining offensive language discussed above. The program aired several hours later on stations in the Mountain and Pacific time zones, and Fox did remove the offensive language before it aired on those stations.[89]

33. As Fox points out, the FCC has long recognized that it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event under some circumstances.[90] But the Commission has not hesitated to enforce its indecency standard where, as here, a licensee fails to exercise "reasonable

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[89] *Id.* at 8-9. Following this broadcast, Fox implemented a longer delay mechanism and a second delay button for all live broadcasts to serve as a back-up. *Id.* at 9. In its recent response to a LOI relating to the broadcast of "The 2002 Billboard Music Awards," Fox states that it now uses a total of four delay buttons for all live broadcasts of entertainment programming. In addition, it "recognizes that certain performers may present more risk of spontaneous objectionable content during live performances than others" and thus "has begun to tape in advance certain performances to air during otherwise 'live' broadcasts." See Letter from John C. Quale to Marlene H. Dortch, Secretary, FCC, File No. EB-03-IH-0460 at 6 (Sept. 21, 2006) ("Fox Response to 9/7/06 LOI").

[90] *Pacifica*, 438 U.S. at 733 n.7, *quoting Pacifica Foundation*, 59 FCC 2d at 893 n.1. *See Response* at 12.

judgment, responsibility and sensitivity to the public's needs and tastes to avoid patently offensive broadcasts."[91] Here, the original script for "The 2003 Billboard Music Awards" increased the likelihood that Ms. Richie would ad-lib offensive remarks; as noted above, it called for her to make excretory references to "pig crap" and "cow manure," and to substitute the euphemism "freaking" for the "F-Word."[92] Such a script

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[91] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2700 ¶ 18. *See Liability of San Francisco Century Broadcasting, L.P.*, Memorandum Opinion and Order, 8 FCC Rcd 498, 499 ¶ 7 (1993) ("the mere fact that a show is live does not excuse a station from exercising its editorial responsibilities, especially where commonly available screening techniques can eliminate the element of surprise."), *citing Sound Broadcasting Corp.*, Notice of Apparent Liability, 6 FCC Rcd 2174 (Mass Media Bur. 1991); *Radio Station KFMH-FM, Muscatine, Iowa*, Notice of Apparent Liability, 9 FCC Rcd 1681, 1681-82 (Mass Media Bur. 1994) (rejecting contention that licensee should not be held responsible for broadcasting live and unscripted offensive material from an outside source where the broadcaster suspected "that the caller involved was the same person who had told the objectionable joke only eight minutes earlier" but "chose to place the call on the air rather than to discontinue the broadcast or to use precautions such as a delay device."); *L.M. Communications*, Notice of Apparent Liability, 7 FCC Rcd 1595 (Mass Media Bur. 1992) (rejecting argument that broadcaster should not be sanctioned for airing indecent material within live and unscripted programming where "the scatological material as broadcast involved a deliberate and repetitive use of the word 'crap' to heighten the audience's awareness of and attention to the subsequent use of the term 'shit' by the announcer.").

[92] *See* Response at 6; *see also Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, 21 FCC Rcd 2760, 2769 ¶ 19 (2006) (citing evidence that "there is always a risk that performers will ad-lib remarks or take unscripted actions, and that the risk level varies according to the nature of the performance.") (subsequent history omitted).

might have posed minimal risk in the hands of some performers. Relying on Ms. Hilton and Ms. Richie to avoid vulgar language, however, involved a substantially greater risk.[93] As Fox well knew, Ms. Richie frequently used indecent language in inappropriate contexts. For example, during the three episodes of "The Simple Life" that it broadcast in the days leading up to the "The 2003 Billboard Music Awards," Fox felt it necessary to bleep expletives (the "F-Word" or "S-Word") uttered by Ms. Richie no fewer than nine times.[94] Yet Ms. Richie was still selected as a presenter for the live, prime-time awards show, and Fox has not claimed it made any effort to caution Ms. Richie about its broadcast standards for the program or that it took any special precautions (beyond its standard five-second delay) to guard against her use of expletives on the air. Indeed, Fox does not

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[93] *See supra* note 27. As discussed above, Fox advertised Ms. Hilton and Ms. Richie as being "totally-out-ofcontrol" on the cover of the Simple Life DVD. Additionally, *The Los Angeles Times* review of the first episode of "The Simple Life" describes Ms. Hilton and Ms. Richie as "out-of-control." Carina Chocano, *Work for a Living? What a Concept*, L.A. Times, Dec. 2, 2003, at 1 (Calendar Section).

[94] *"The Simple Life,"* Season 1, Episodes 1-3. In addition, Ms. Richie's penchant for cursing is highlighted in a scene during the first episode in which their host, reviewing the house rules with them, states "no cussing or bad language," at which point the camera focuses on Ms. Richie giggling helplessly at Ms. Hilton. Their penchant for vulgarity is also illustrated during the third episode in two scenes at a local fast food franchise where Ms. Richie and Ms. Hilton are working for the day. Directed to change the letters of a sign out front to read "Half Price Burgers All Day," they instead arrange the letters to read "1/2 Price Anal Salty Weiner Bugers." Later, standing on the curb in costumes of the restaurant's mascot, an animated milkshake, they stick up their respective middle fingers (which are pixilated) to passersby.

even contend that it took any action against Ms. Richie after this episode.

34. Even more significant, the particular five-second delay and editing system that Fox used in this case had already proved inadequate to delete Cher's offensive language during Fox's broadcast of "The 2002 Billboard Music Awards" the previous year. During that broadcast, Cher, when accepting an award, had stated, "'People have been telling me I'm on the way out every year, right? So fuck 'em.'"[95] According to Fox, the employee in charge of deleting objectionable material did not act quickly enough and ended up editing out dialogue that aired after Cher's comment.[96] Despite this failure, Fox took no additional precautions to avoid airing such material the next year.[97] The record also demonstrates that steps may be taken, such as adding "delay buttons" or lengthening the delay, that allow for far more effective editing of potentially objectionable content.[98] Here, Fox itself contends that the time delay and editing system that it used for "The 2003 Billboard Music Awards" was inadequate, maintaining that it imposed on the operator a "Herculean task" because he was "essentially trying to watch two programs at once—the live version occurring in real-time and the delayed version that was broadcast seconds later."[99] Then, if he heard or saw objectionable content, he was required to "press the appropriate audio

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[95] *See infra* para. 56.

[96] *See* Fox Response to 9/7/06 LOI at 5.

[97] *See* Response at 5.

[98] *See, e.g., id.* at 8-9.

[99] Fox Response to 9/18/2006 LOI at 10 n. 21.

and/or video delay buttons at the precise instant necessary to eliminate the objectionable content from the delayed feed" while at the same time "staying abreast of the continuing live feed."[100] In short, under these circumstances, Fox should have recognized the high risk that "The 2003 Billboard Music Awards" broadcast raised of airing indecent material. Nevertheless, Fox chose to rely on the same delay and editing system that had proved inadequate the previous year to delete an expletive during the same show. We are not persuaded, therefore, that Fox's efforts to edit out the offensive language were diligent or reasonable.

35. We recognize that no delay and editing system is foolproof and that there is always a possibility of human error in using delay equipment to edit live programming. The Commission can and will consider these facts in deciding what, if any, remedy is appropriate. In this case, however, as discussed above, we conclude that Fox's efforts to prevent and edit out Ms. Richie's comments were not diligent or reasonable.

36. Holding Fox responsible for airing indecent material in this case does not place live broadcasts at risk or impose undue burdens on broadcasters.[101] This case does not involve breaking news coverage that Fox and other broadcasters have traditionally presented in so-

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[100] *Id.* By contrast, Fox states that its current time delay and editing system "relies upon technology to ensure that once an edit button is pressed, the potentially objectionable content is edited at the right time during the delayed feed." *Id.* As stated above, Fox's current system also utilizes more than one employee "to provide redundancy." *Id.* at 10.

[101] *See Joint Comments* at 12-16.

called "real time."[102] Nevertheless, Fox argues that "[t]he live presentation of awards shows . . . is what makes this content so compelling."[103] Fox, however, did not even decide to air the program live in much of the country. Rather, viewers in the Mountain Time Zone saw the program with a one-hour delay, and those in the Pacific Time Zone experienced a three-hour delay. We find it difficult to understand why viewers on the East Coast would no longer find "live programming" to be "compelling" with a ten-second delay while it is evidently acceptable to provide this programming to viewers in the western half of the country with a one-hour or three-hour delay. Moreover, with respect to awards shows as a whole, the record reflects that the vast majority of awards shows are not aired by major networks live in the Pacific Time Zone.[104] Rather, they are generally broadcast with a three-hour delay, thus undermining any assertion that it is important that viewers see the presentation of the awards without the compara-

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[102] Since this case does not involve breaking news or sports programming, we do not address issues involving such programming here. But as we recognize elsewhere in this Order, "in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming." *See infra*, § III.C.

[103] See *Joint Comments*, Appendix X (Declaration of Peter Ligouri) at ¶ 2.

[104] Of the 32 awards shows that were broadcast by the major networks and are discussed in the record, only the Academy Awards aired live in all time zones. *See* ABC Response to 9/18/2006 LOI at 2; NBC Response to 9/18/2006 LOI at 4 and Exh. C.; Fox Response to 9/18/2006 LOI at 3-4; CBS Response to 9/18/2006 LOI at 7.

tively minimal delay required to remove indecent language.

37. Under the circumstances, we fail to see how a delay of five, ten, or even fifteen seconds meaningfully affects the value of this programming or significantly implicates First Amendment values. In this vein, we note that so-called "live" programming is not literally live—viewers at home do not see an event at the very time that it is actually occurring. Rather, there is a natural delay caused by the time that it takes a signal to reach viewers. The record shows that digital signals, for example, may take up to 1.3 to 3.3 seconds to reach viewers over-the-air.[105] And, if viewers are receiving such signals through a cable operator or satellite provider, there may be an additional delay of up to 3 seconds.[106] Finally, if a viewer has a digital video recorder, there is another additional delay of approximately another half-second.[107] Thus, using a conservative estimate, a viewer may be watching an event more than three seconds after it occurs, even in the absence of any delay technology. In light of this, we fail to see how there is a meaningful adverse impact on a viewer's experience because he or she learns the winner of the Billboard Award for Top 40 Mainstream Track some eight to eighteen seconds after

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[105] Fox Response to 9/18/2006 LOI at 11.

[106] *Id.*

[107] *Id. See* ABC Response to 9/18/2006 LOI at 7-8 (reporting that transmitting signals from ABC's New York Broadcast Center to affiliates results in less than a two second delay, that feeding live material from remote locations to ABC's New York Broadcast Center may cause an additional delay of up to a second, and that distribution of the signals to the consumers through cable and satellite systems may cause an additional delay).

the winner is announced on stage in Las Vegas (with a delay) as opposed to after the normal three to six seconds (without one).

38. Finally, we note that our decision here will not deprive Fox of the ability to present such programming in substantially the same way that it has in the past. Fox has utilized a time delay and other procedures to avoid airing patently offensive material during live entertainment broadcasts such as "The 2003 Billboard Music Awards" for years before the Commission's decision in the *Golden Globe Awards Order*.[108] We also disagree that "delaying live broadcasts to edit potentially offensive language inevitably results in overbroad censorship of appropriate material."[109] As the D.C. Circuit observed, "some degree of self-censorship is inevitable and not necessarily undesirable so long as proper standards are available."[110] The possibility that an over-zealous broadcast standards employee may "dump" material that is not actionably indecent during the live presentation of an awards show does not outweigh the compelling

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[108] *See Response* at 8; *see also* Fox Response to 9/7/06 LOI at 5. In addition, Fox uses delays for live entertainment broadcasts even after 10 p.m. *See id.* at 5-7. The Commission's indecency regulation does not apply at that time, *see* 47 C.F.R. § 73.3999(b), so Fox obviously has reasons apart from regulatory compulsion for using a delay.

[109] *Joint Comments* at 15.

[110] *Action for Children's Television v. FCC*, 59 F.3d 1249, 1261 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) (*ACT IV*), *citing Pacifica*, 438 U.S. at 743. *See ACT III*, 58 F.3d at 666 ("Whatever chilling effects may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act.").

interest in preventing patently offensive broadcasts such as the one that occurred in this case.

39. For all of these reasons, we conclude that Fox's broadcast of "The 2003 Billboard Music Awards" violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency and that it is not inequitable to hold Fox responsible for these violations.

40. *Profanity Analysis.* Consistent with our decisions in the *Golden Globe Awards Order* and the *Omnibus Order*, we also find that the complained-of language in the program at issue violated Section 1464's prohibition on the broadcast of "profane" utterances.[111] In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of Section 1464 because, in context, it constituted vulgar and coarse language "'so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'"[112] Similarly, we concluded in the *Omnibus Order* that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane.[113] In certain cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work

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[111] 18 U.S.C. § 1464.

[112] *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 13, *quoting Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972).

[113] *Omnibus Order*, 21 FCC Rcd at 2686 ¶ 81 ("Like the 'F-Word,' [the 'S-Word'] is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.").

or essential to informing viewers on a matter of public importance.[114] However, such circumstances are not present here: Fox does not contend that Ms. Richie's profane language was essential to informing viewers on a matter of public importance or that modifying the language would have had a material impact on its function as a source of news and information. On the contrary, Fox sought (albeit unsuccessfully) to delete the profane language, and did remove it before the program aired on time delay in the Mountain and Pacific Time Zones.[115] It is undisputed that the complained-of material, including the "F-Word" and the "S-Word," was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination.[116] Because there was a reasonable risk that children may have been in the audience at the time of the broadcast on December 10, 2003,[117] the broadcast is legally actionable.

41. Contrary to the Networks' *Joint Comments*, we believe that our interpretation of "profane" as used in Section 1464 is appropriate.[118] The word has long carried a variety of meanings, including non-religious

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[114] *Id.* at 2669 ¶ 19, *citing Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

[115] *Response* at 8.

[116] *See Omnibus Order*, 21 FCC Rcd at 2666 ¶ 8.

[117] *See supra* para. 18 (noting that, according to Nielsen ratings data, 23.4% of the people watching an average minute of "The 2003 Billboard Music Awards" broadcast were under 18, and 11% were between the ages of 2 and 11).

[118] *See Joint Comments* at 28-32; Thomas Jefferson Center For the Protection of Free Expression Comments at 11-15 (Sept. 21, 2006).

meanings.[119] Several courts have interpreted the word in a non-religious sense, consistent with the established rule that a court should construe a statute, if reasonably possible, to avoid constitutional problems.[120] Further,

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[119] The 1891 edition of the Century Dictionary includes this definition of profane: "2. To put to a wrong use; employ basely or unworthily." Century Dictionary 4754 (1891 ed.). In an appendix to his concurring opinion in *Burstyn v. Wilson*, 343 U.S. 495, 533-40 (1952), Justice Frankfurter collected definitions of "sacrilege," "blasphemy," and "profane" dating to 1651. The earliest of these definitions of profane is "to apply any thing sacred to common use. To be irreverent to sacred persons or things. To put to a wrong use." *Id.* at 536, *quoting* Rider, A New Universal English Dictionary (London, 1759). The next is "To violate; to pollute.—To put to wrong use." *Id.* at 537, *quoting* Kenrick, A New Dictionary of the English Language (London, 1773). Frankfurter's concurring opinion also notes that Funk & Wagnalls' New Standard Dictionary of the English Language, first copyrighted in 1913, includes a definition of "to profane" as "3. To vulgarize; give over to the crowd." *Id.* at 527 n. 48. Thus, we disagree that Congress clearly would have understood the term in 1927 to mean only blasphemous or sacrilegious. *Joint Comments* at 28.

[120] *See Tallman v. United States*, 465 F.2d at 286; *State v. Richards*, 896 P.2d 357, 364 (Id. App. 1995) (in rejecting a vagueness challenge to state statute proscribing telephone harassment through, *inter alia*, "obscene, lewd or profane language," construing "profane" to mean "characterized by abusive language . . . cursing or vituperation . . ."); *see also United States v. Hicks*, 980 F.2d 963, 970 n.9 (5th Cir. 1992) (angry reference to flight attendant as a "bitch" and angry admonition that she should get her "ass" to the plane's kitchen qualified as "profane"). We disagree with the Networks that Tallman addressed the word's meaning in dicta, and that the case actually refutes the Commission's interpretation because the Court cited with approval *Duncan v. United States*, 48 F.2d 128 (9th Cir.), *cert. denied*, 383 U.S. 863 (1931), and *Gagliardo v. United States*, 366 F.2d 720 (9th Cir. 1966). *See Joint Comments* at 31. *Tallman* held that the word "profane" in Section 1464 must be interpreted narrowly as, *inter alia*, "denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to

when viewed in its statutory context with the words "obscene" and "indecent," both of which have vulgar overtones, we believe that the word "profane" is reasonably interpreted in the related sense of "grossly offensive."[121]

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a nuisance" to preserve its validity in response to a facial constitutional challenge. *Tallman*, 465 F.2d at 286. The Court cited *Duncan* and *Gagliardo* solely as examples of prior judicial interpretations available to the trial judge had jury instructions on the word's meaning been necessary, without approving or even identifying such interpretations. *Id.* We also reject the Networks' argument that the rule of lenity counsels against the Commission's interpretation of "profane." *See Joint Comments* at 30, n.34. Among other things, the Networks make no showing that their preferred construction of the term is any narrower than the Commission's. Indeed, we think it likely that more broadcast speech would be considered "profane" under the Networks' interpretation of the term than under ours. *See also infra* para. 54 (explaining that the *Pacifica* Court squarely rejected the argument that the FCC's civil authority to enforce Section 1464 must be interpreted in accordance with rules that apply to criminal statutes, such as the rule of lenity).

[121] *See State v. Richards*, 896 P.2d at 364 ("when words appear in a list or are otherwise associated, they should be given related meanings."), *citing Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961), 2A Norman J. Singer, Southerland's Statutes and Statutory Construction § 47.16 at 183 (5th ed. 1992); *United States v. Hicks*, 980 F.2d at 970 n.9 ("By 'profanity' or 'vulgarity,' we refer to words that, while not obscene, nevertheless are considered generally offensive by contemporary community standards."). The fact that the words "indecent" and "profane" in Section 1464 have "separate" meanings does not render our interpretation of profane "implausible." *See Joint Comments* at 31, *quoting Pacifica*, 438 U.S. at 739-40. We recognize that the two words have separate meanings, and the Commission interprets the two words differently. Our enforcement policy limiting the regulation of profane language to words that are sexual or excretory in nature or are derived from such terms stems from First Amendment considerations rather than the meaning of the word. *See Omnibus Order*, 21 FCC Rcd at 2669 ¶ 18.

We do not read the cases cited by the Networks as precluding a non-religious interpretation. *Duncan* upheld a conviction for broadcasting profanity where the defendant "referred to an individual as 'damned,'" "used the expression 'By God' irreverently," and "announced his intention to call down the curse of God upon certain individuals."[122] But the court held only that this language was "within the meaning of that term" as used in the Radio Act of 1927, not that the provision *only* covered such language.[123] *Gagliardo* addressed the meaning of "profane" in Section 1464 only in *dicta*, because the government in that case did not contend that the words at issue were profane.[124] Finally, the fact that the Commission has a specific rule addressing "obscene" and "indecent" programming[125] plainly does not foreclose the agency from exercising in an adjudication its express

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[122] *Duncan*, 48 F.2d at 133-34 (the phrase "God damn it" uttered in anger was not profane under Section 1464).

[123] *Id.* at 134. *Duncan* was decided before constitutional law evolved to the point that such language could not be proscribed. *See Burstyn v. Wilson*, 343 U.S. 495 (1952) (holding unconstitutional a New York statute authorizing state officials to license films for public exhibition unless the films are "sacrilegious").

[124] *Gagliardo*, 366 F.2d at 725 ("God damn it" uttered in anger not legally profane). The FCC did not address whether "profane" could be interpreted in a non-religious sense in *Raycom America, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 4186 (2003) (portions of "The West Wing" in which a character "'scream[ed] at God,' and made irreverent references toward the deity—'[y]ou're a sonofabitch, you know that?,' and 'have I displeased you, you feckless thug?'" not actionably profane), and *Warren B. Appleton*, 28 FCC 2d 36 (Broadcast Bur. 1971) ("damn" not actionably profane), because those cases involved language with religious connotations.

[125] 47 C.F.R. § 73.3999.

statutory authority to take enforcement action against broadcasts that are "profane."[126]

42. *Constitutional Issues.* The Networks offer a variety of arguments attacking the constitutionality of the Commission's indecency framework as it relates to "The 2003 Billboard Music Awards" broadcast. We do not find any of these arguments to be persuasive.

43. First, the Networks argue that our definition of indecency is unconstitutionally vague.[127] However, that definition is essentially the same as the one that we articulated in the order under review in *FCC v. Pacifica Foundation.*[128] The Supreme Court had no difficulty in applying that definition and using it to conclude that the broadcast at issue in that case was indecent.[129] We agree with the D.C. Circuit that "implicit in *Pacifica*" is an "acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge."[130]

44. The Networks suggest that the Supreme Court's more recent decision in *Reno v. ACLU*[131] has "undermine[d] any constitutional defense of the Commission's current approach" to indecency.[132] In *Reno*, the Court considered the constitutionality of the Communications Decency Act of 1996 (CDA), a statute that regulated

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[126] 47 U.S.C. § 1464; 47 U.S.C. § 503(b)(1)(D). *See Joint Comments* at 32.

[127] *See, e.g., Joint Comments* at 7-8.

[128] *Pacifica*, 438 U.S. at 732.

[129] *See id.* at 739, 741.

[130] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (*"ACT I"*); *accord ACT III*, 58 F.3d at 659.

[131] 521 U.S. 844 (1997).

[132] *Joint Comments* at 7.

indecency on the Internet and that contained a definition similar to ours.[133] Though the Court did not hold that the statute was "so vague that it violates the Fifth Amendment," it concluded that "the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment."[134]

45. *Reno* in no way undermines *Pacifica*. On the contrary, the Court in *Reno* expressly distinguished *Pacifica*, and it gave three different reasons for doing so. First, the Court noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that the Commission's regulations simply "designate when—rather than whether—it would be permissible" to air indecent material.[135] The CDA, in contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times."[136] Second, the CDA was a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent broadcasts.[137] Third, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection."[138] Thus, far from casting doubt on *Pacifica*'s vagueness holding, *Reno* recognizes its continuing vitality.

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[133] *See* 47 U.S.C. § 223(d) (1994 Supp. II).

[134] *Reno*, 521 U.S. at 870.

[135] *Id.* at 867.

[136] *Id.*

[137] *See id.* at 867, 872; *see also Pacifica*, 438 U.S. at 750 (declining to decide whether an indecent broadcast "would justify a criminal prosecution").

[138] *Reno*, 521 U.S. at 867 (quoting *Pacifica*, 438 U.S. at 748).

46. The Networks also argue that the more relaxed level of First Amendment scrutiny discussed in *Pacifica* should no longer apply to broadcasting in light of changes in the media marketplace. Specifically, they contend that because of the prevalence of other media, such as the Internet and cable and satellite television, "it is fanciful to believe that aggressive enforcement of § 1464 against broadcasters will be effective in preventing children from being exposed to potentially offensive words."[139]

47. We disagree that technological changes have undermined the validity of the reasoning in *Pacifica*.[140] In *Pacifica*, the Court identified two reasons why broadcasting has received "the most limited First Amendment protection."[141] First, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home."[142] Second, "broadcasting is uniquely accessible to children, even those too young to read."[143]

48. Notwithstanding the growth of other communications media, courts have recognized the continuing validity of these rationales. In 1994, the Supreme Court reaffirmed that "our cases have permitted more intrusive

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[139] *Joint Comments* at 22.

[140] In any event, the Commission has no authority to overrule *Pacifica*. Cf. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

[141] *Pacifica*, 438 U.S. at 748.

[142] *Id.*

[143] *Id.* at 749.

regulation of broadcast speakers than of speakers in other media."[144] And the D.C. Circuit has rejected precisely the argument advanced by the Networks here: "Despite the increasing availability of other means of receiving television, such as cable, . . . there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment."[145]

49. The broadcast media continue to have "a uniquely pervasive presence" in American life. The Supreme Court has recognized that "[d]espite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'"[146] Though broadcast television is "but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression."[147] In 2003, 98.2% of households had at least one television, and 99% had at least one radio.[148] The Networks correctly point out that almost 86% of households with tele-

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[144] *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994); *see also Reno*, 521 U.S. at 868 (recognizing "special justifications for regulation of the broadcast media").

[145] *ACT III*, 58 F.3d at 660. *See also Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004) (rejecting argument that broadcast ownership regulations should be subjected to higher level of scrutiny in light of the rise of "non-broadcast media").

[146] *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (*quoting U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

[147] *Id.* at 194.

[148] U.S. Census Bureau, *Statistical Abstract of the United States* 737 (2006).

vision subscribe to a cable or satellite service.[149] That still leaves 15.4 million households that rely exclusively on broadcast television, hardly an inconsequential number.[150] In addition, it has been estimated that almost half of direct broadcast satellite subscribers receive their broadcast channels over the air,[151] and many subscribers to cable and satellite still rely on broadcast for some of the televisions in their households.[152] All told, the National Association of Broadcasters ("NAB") estimates that there are an estimated 73 million broadcast-only television sets in American households.[153] Moreover, many of those broadcast-only televisions are in children's bedrooms. According to a 2005 Kaiser Family Foundation report, 68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly

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[149] *Joint Comments* at 21 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 8 (2006) ("*Annual Assessment*")).

[150] *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15; *see also* Comments of the Walt Disney Co. in MB Docket No. 04-210 at 2 (filed Aug. 11, 2004) ("Disney/ABC stresses that these customers [relying on broadcast only] represent a significant portion of our potential viewing audience.").

[151] *Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, No. 04-210, ¶ 9 (MB Feb. 28, 2005), *available at* 2005 WL 473322, at *2.

[152] *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15.

[153] *Id.* at 2552 ¶ 97. The NAB has properly characterized this number as "enormous." Reply Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. in MB Docket No. 04-210 at i (filed Sept. 7, 2004).

half of those sets do not have cable or satellite connections.[154]

50. In addition, the bare number of cable and satellite service subscribers does not reflect the large disparity in viewership that still exists between broadcast and cable television programs. For example, during the week of September 18, 2006, each of the top ten programs on broadcast television had more than 15 million viewers, while only one program on cable television that week managed to attract more than 5 million viewers.[155] Similarly, of the 495 most-watched television programs during the 2004-2005 season, 485 appeared on broadcast television, and the highest-rated program on cable television was only the 257th most-viewed program of the season.[156]

51. The broadcast media are also "uniquely accessible to children." In this respect, broadcast television differs from cable and satellite television. Parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children. Indeed, upon the request of a subscriber, cable providers are required by statute to "fully block the audio and video

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[154] *See* Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (2005).

[155] *See* Nielsen Media Research, "Top 10 Broadcast TV Programs for the Week of September 18, 2006;" Nielsen Media Research, "Top 10 Cable TV Programs for the Week of September 18, 2006."

[156] *See* Television Bureau of Advertising, "Season-to-Date Broadcast vs. Subscription TV Primetime Ratings: 2004-2005," *available at* http://www.tvb.org/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2004-2005.asp.

programming of each channel carrying such programming so that one not a subscriber does not receive it."[157] In contrast, as the D.C. Circuit has observed, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters."[158] The V-chip provides parents with some ability to control their children's access to broadcast programming. But most televisions do not contain a V-chip, and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it.[159] In addition, the effectiveness of a V-chip depends on the accuracy of program ratings; a V-chip is of little use when, as here, the rating does not reflect the material that is broadcast.[160] In light of the TV-PG rating given to "The 2003 Billboard Music Awards," even an informed use of a V-

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[157] 47 U.S.C. § 560 (2000); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

[158] *ACT III*, 58 F.3d at 660.

[159] *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667 ¶ 37. In Congressional testimony shortly after the 2003 Billboard Music Awards, Fox's President of Entertainment acknowledged that the V-chip and television ratings were "underutilized." *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. On Energy & Commerce*, 107th Congress, (Feb. 26, 2004) (statement of Gail Berman). According to a 2003 study, parents' low level of V-chip use is explained in part by parents' unawareness of the device and the "multi-step and often confusing process" necessary to use it. Annenberg Public Policy Center, *Parents' Use of the V-Chip to Supervise Children's Television Use* 3 (2003). Only 27 percent of mothers in the study group could figure out how to program the V-Chip, and "many mothers who might otherwise have used the V-Chip were frustrated by an inability to get it to work properly." *Id.* at 4.

[160] *See supra* para. 18, n. 46; *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667-68 ¶ 37.

chip would not necessarily have protected children from Ms. Richie's vulgar comments,[161] and studies demonstrate that inaccurate ratings are far from an isolated problem. In a Kaiser Family Foundation survey, for example, nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately.[162]

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[161] *See supra* para. 18, n.46.

[162] Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004) ("Kaiser Survey"). Likewise in a study published in the journal *Pediatrics*, parents concluded that half of television shows the industry had rated as appropriate for teenagers were in fact inappropriate, a finding the study authors called "a signal that the ratings are misleading." David A. Walsh & Douglas A. Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 Pediatrics 1302, 1306 (2001).

Academics who have studied the television rating system share parents' assessment that the ratings are often inaccurate. A 2002 study found that many shows that should carry content descriptors do not, therefore leaving parents unaware of potentially objectionable material. *See* Dale Kunkel, *et al., Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 Journal of Communications 112 (2002). For example, the study found that 68 percent of prime-time network shows without an "L" descriptor contained "adult language," averaging nearly three scenes with such language per show. *See id.* at 132; *see also id.* at 131 (finding that 20 percent of shows rated TV-G—supposedly appropriate for all ages—included objectionable language, including "bastard," "bitch," "shit," and "whore"). In fact, "in all four areas of sensitive material—violence, sexual behavior, sexual dialogue, and adult language—the large majority of programs that contain such depictions are not identified by a content descriptor." *Id.* at 136. The study's authors concluded that "[p]arents who might rely solely on the content-based categories to block their children's exposure to objectionable portrayals would be making a serious miscalculation, as the content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." *Id.*

52. Broadcast television is also significantly different from the Internet. The Internet, unlike television, is not

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A 2004 study also raised serious questions about the accuracy of television ratings. It found that there was more coarse language broadcast during TV-PG programs than those rated TV-14, just the opposite of what these age-based ratings would lead a viewer to believe. Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 Journal of Broadcasting & Electronic Media 554, 563-64 (2004); *see also* Parents Television Council, *The Ratings Sham: TV Executives Hiding Behind A System That Doesn't Work* (April 2005) (study of 528 hours of television programming concluding that numerous shows were inaccurately and inconsistently rated); *Effectiveness of Media Rating Systems: Subcommittee of Science, Technology, and Space of the Senate Comm. On Commerce, Science & Transp.*, 107th Congress (2004) (statement of Ms. Patti Miller, director, Children and the Media Program for Children Now) ("Can parents depend on the accuracy of the ratings systems? Sadly, the answer is no.").

An economist studying the question of why broadcasters consistently "underlabel" their programs concluded that they are likely responding to economic incentives. *See* James T. Hamilton, *Who Will Rate the Ratings?, in The V-Chip Debate: Content Filtering from Television to the Internet* 133, 143, 149 (Monroe E. Price, ed. 1998). He found that programs with more restrictive ratings command lower advertising revenues. *See id.* at 143. The desire to charge more for commercials and fear of "advertiser backlash" over shows with more restrictive ratings "means that networks have incentives to resist the provision of content-based information." *Id.* at 149; *see also* Kunkel, 52 Journal of Communications at 114 ("[T]he prospect that applying 'higher' ratings to a program could reduce audience size raises a self-interest concern regarding the accuracy with which judgments about program ratings are determined.").

Finally, even assuming *arguendo* that the content descriptors were accurately applied, they would not assist the majority of parents because they are not sufficiently understood. The Kaiser Survey found that only 51% of parents understand that "V" stands for violence; only 40% understand "L" stands for language; only 37% understand "S" stands for sex; and only 4% understand that "D" stands for suggestive or sexual dialogue. Kaiser Survey at 6.

accessible to children "too young to read."[163] And parents who wish to control older children's access to inappropriate material can use widely available filtering software—an option that, whatever its flaws, lacks an effective analog in the context of broadcast television[164] in light of the numerous problems with the V-chip and program ratings discussed above.[165]

53. *No Sanction Proposed.* For the reasons stated above, we conclude that "The 2003 Billboard Music Awards" contained indecent and profane material in violation of Section 1464 and our rules. Fox stations broadcast indecent and profane language in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. Under the circumstances,

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[163] *Pacifica*, 438 U.S. at 749. *See, e.g., Youth, Pornography, and the Internet*, ed. by Dick Thornburgh and Herbert S. Lin, p. 115 (National Academy Press 2002) ("As a general rule, young children do not have the cognitive skills needed to navigate the Internet independently. Knowledge of search strategies is limited if not nonexistent, and typing skills are undeveloped.").

[164] *See Reno*, 521 U.S. at 877. Filtering software, for example, can block access to a website based on the software's evaluation of the site's content. The V-chip, in contrast, does not evaluate television programs itself and therefore is only effective if the programs have been given accurate ratings. However, to the extent that filtering software is ineffective and children are still able to access indecent material on the Internet, we note that Congress has sought to address this problem through the Child Online Protection Act, a statute whose validity is still being litigated. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming preliminary injunction). We note that the Networks also refer to the availability of video game consoles as another medium that, in their view, is as pervasive as television. *See Joint Comments* at 21-22. Video games differ from broadcast television in that games must be purchased individually, so a parent who purchases a video game console for a child retains the ability to determine which games the child will play.

[165] *See supra* para. 51 and nn. 159-162.

however, we propose no forfeiture here. We originally declined to propose a sanction in this case because the broadcast occurred prior to the *Golden Globe Awards Order*. As discussed above, we believe on further consideration that the complained-of language was actionable under Commission decisions preceding the *Golden Globe Awards Order*. Nevertheless, we still decline to propose a forfeiture here. To begin with, proposing a sanction would require issuance of a notice of apparent liability, which would not be "a further final or appealable order of the FCC," as required by the *Remand Order*.[166] In addition, even absent the requirement that we issue a "final or appealable order," we would not exercise our enforcement discretion to propose a forfeiture here given the limited remand under which we are proceeding. Accordingly, we find that no forfeiture is warranted in this case.[167] In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications, and we will not consider the broadcast to have an ad-

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[166] *Remand Order* at 2. *See* 47 U.S.C. § 503(b)(4)(C); *ACT IV*, 59 F.3d at 1254, citing *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C. Cir. 1977).

[167] In light of recent legislation, the Networks raise the prospect of future fines in excess of $65 million for "a single, fleeting instance of indecent speech." *Joint Comments* at 16. We do not believe, however, that a case similar to "The 2003 Billboard Music Awards" arising in the future would merit the maximum fine permitted under the Broadcast Decency Enforcement Act. *See* Pub. L. 109-235, 102 Stat. 491 (June 15, 2006), *to be codified* at 47 U.S.C. § 503(b)(2)(C)(ii). While that Act, once we adopt implementing regulations, will provide the Commission with the flexibility to impose appropriate fines in egregious cases, the Commission will continue to follow a restrained enforcement policy in imposing forfeitures in this area.

verse impact upon such licensees as part of the renewal process or in any other context.

54. In light of our decision not to impose a forfeiture, we need not address whether the violations of Section 1464 and our rule were willful within the meaning of Section 503(b).[168] We disagree with the Networks, however, that Section 1464 is not violated unless a broadcaster acts with the state of mind required for a criminal conviction.[169] The Supreme Court has squarely rejected the argument that the FCC's civil authority to enforce Section 1464 must be interpreted in accordance with rules that apply to criminal statutes, explaining: "The legislative history of the provisions establishes their independence. As enacted in 1927 and 1934, the prohibition on indecent speech was separate from the provisions imposing civil and criminal penalties for violating the prohibition . . . Although the 1948 codification of the criminal laws and the addition of new civil penalties

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[168] *See* 47 U.S.C. §§ 503(b)(1)(B) & (D). We also need not address whether responsibility would lie with independent Fox affiliates in addition to the licensees owned by Fox. *Cf. Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19240-41 ¶ 25 (2004).

[169] *Joint Comments* at 24-26. We also reject, as contrary to the plain meaning of the Act, the Networks' contention that we may not impose forfeitures for violations of our indecency rule under section 503(b)(1)(B). While the Networks suggest that the Commission's indecency rule, 47 C.F.R. § 73.3999, merely represents a decision by the Commission to restate 18 U.S.C. § 1464, the indecency rule was adopted by the Commission pursuant to the direction of Congress. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949, Section 16 (1992).

changed the statutory structure, no substantive change was apparently intended . . . Accordingly, we need not consider any question relating to the possible application of § 1464 as a criminal statute."[170] Thus, the *mens rea* necessary for a criminal conviction is not a prerequisite to the Commission's finding a Section 1464 violation.[171]

B. "The 2002 Billboard Music Awards"

55. *The Programming.* The Commission received a complaint alleging that WTTG(TV), Washington, DC, broadcast indecent material during "The 2002 Billboard Music Awards" program which aired at 8 p.m. Eastern Standard Time on December 9, 2002.[172] Specifically, the

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[170] *Pacifica*, 438 U.S. at 739 n.13.

[171] The Networks' reliance on *FCC v. ABC*, 347 U.S. 284, 296 (1954), for the proposition that "'[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice'" is misplaced. *Joint Comments* at 24. In that case, the Court rejected the broad construction urged by the Commission of a statutory prohibition against a "lottery, gift enterprise, or similar scheme" in part because "the same construction would likewise apply in criminal cases." *FCC v. ABC*, 347 U.S. at 296. In contrast, the intent required to impose civil penalties for Section 1464 violations has no impact on its possible application as a criminal statute. *See Pacifica*, 438 U.S. at 739 n. 13.

[172] FCC File No. EB-03-IH-0460. *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003). As noted in the *Golden Globe Awards Order*, the Commission's Enforcement Bureau had dismissed an earlier complaint concerning the same broadcast on the same station eight months earlier. *See* Letter from Charles Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC to RadioEsq@aol.com, EB-02-IH-0861-MT (December 18, 2002), *cited in Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 n.32 (noting Bureau dismissal

complainant alleged that while accepting an award, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."[173] The "2002 Billboard Music Awards" was broadcast nationwide on the Fox Television Network.

56. Examination of a videotape of the broadcast reveals that Cher, a singer and actress, was presented with an "Artist Achievement Award" during "The 2002 Billboard Music Awards" program. Cher had been selected to receive this award at least three weeks before the broadcast.[174] In the course of her remarks accepting the award, she stated as follows: "I've had unbelievable support in my life and I've worked really hard. I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't."

57. Following the Second Circuit's remand, the Bureau sent Fox a letter of inquiry on September 7, 2006 concerning "The 2002 Billboard Music Awards" broad-

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of complaint). However, Fox has raised no claim of administrative res judicata, and thus, because that defense has been waived, we need not consider it. *Cf. Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988).

[173] *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

[174] *See* Press Release, "Cher to Receive the Artist Achievement Award on the 2002 Billboard Music Awards Monday, Dec. 9 on Fox" (Nov. 14, 2002), attached to Letter from John C. Quale, Counsel of Fox, to Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, File No. EB-03-IH-0460 (September 21, 2006) ("Fox Response to 9/7/2006 LOI").

cast.[175] Fox responded on September 21, 2006.[176] Fox's response confirms that it broadcast the material described in the complaint.[177] Nevertheless, Fox argues that its broadcast of the "F-Word," in context, did not depict or describe sexual activities but rather, "at most," was a "vulgar expletive directed as an insult toward an individual or group against whom the speaker held deep-seated feelings of ill-will," and thus is outside the scope of the Commission's indecency definition.[178] Further, Fox argues that the complained-of material was not actionably indecent because it "contained at most the passing use of an expletive used to convey an insult," it "lasted only a couple of seconds out of a two-hour program," and Fox did not present it to pander to or titillate the audience, or for shock value.[179] Therefore, Fox contends that the dialogue is not actionably indecent.[180]

58. *Indecency Analysis.* With respect to the first prong of the indecency test, Fox contends that Cher's

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[175] *See* Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc., File No. EB-03-IH-0460 (September 7, 2006).

[176] *See* Fox Response to 9/7/2006 LOI.

[177] *Id.* at 2.

[178] *Id.* at 10.

[179] *Id.*

[180] Fox also suggests that the complaint should be dismissed because it fails to specifically allege that the complainant viewed "The 2002 Billboard Music Awards." *See id.* at 2. We disagree. Our practice has never been to require such an allegation in order for a complaint to be considered. It is sufficient that the complaint originated from within the market of the station against which the complaint is filed. *See Indecency Policy Statement*, 16 FCC Rcd at 8015 ¶ 24; *see also Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30.

statement "fuck 'em" does not describe sexual activities and thus falls outside the scope of our indecency definition. We disagree. As discussed above, a long line of precedent indicates that both literal and non-literal uses of the "F-Word" come within the subject matter scope of our indecency definition.[181] Given the core meaning of the "F-Word," any use of that word has a sexual connotation.[182] Moreover, it hardly seems debatable that the word's power to insult and offend derives from its sexual meaning.[183] Here, for example, Cher's use of the "F-Word" to reference a sexual act as a metaphor to express hostility to her critics is inextricably linked to the sexual meaning of the term.[184] Accordingly, we conclude that, as we stated in *Golden Globe*,[185] its use falls within the scope of our indecency definition. The material thus warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards for the broadcast medium. Looking at the three principal factors in our contextual analysis, we conclude that it is.

59. We will first address the first and third principal factors in our contextual analysis—the explicit or graphic nature of the material and whether the material panders to, titillates, or shocks the audience. As we

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[181] *See supra* note 38.

[182] *See supra* para. 16.

[183] *See supra* note 40.

[184] *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 224 (1994) (explaining the sexual meaning of the metaphorical use of the "F-Word" as a verb).

[185] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 8.

have previously concluded, the "F-Word" is one of the most vulgar, graphic, and explicit words for sexual activity in the English language.[186] Moreover, the gratuitous use of this language during a live broadcast of a popular music awards ceremony when children were expected to be in the audience was vulgar and shocking. The complained-of material was broadcast in prime time, and the program was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars.[187] As in the case of "The 2003 Billboard Music Awards,"[188] a significant portion of the viewing audience for this program was under 18. According to Nielsen ratings data, during an average minute of "The 2002 Billboard Music Awards" broadcast, 2,608,000 (27.9%) of the 9,361,000 people watching the program were under 18, and 1,186,000 (12.7%) were between the ages of 2 and 11. In addition, the program's TV-PG rating[189] would *not* have put parents or others on notice of such vulgar language, and the broadcast contained no other warnings to viewers that it might contain material highly unsuitable for children.[190] Furthermore, Fox does not argue that there

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[186] *See id.*

[187] *See Pacifica*, 438 U.S. at 749-51 (identifying as relevant contextual factors the time of day of the broadcast, program content as it affects "the composition of the audience," and the nature of the medium). *See also supra* para. 18.

[188] *See supra* para. 18.

[189] Fox Response to 9/7/2006 LOI at 6.

[190] *See supra* n. 47. In the context of a broadcast rated "TV-PG," an "L" content description warning would not have alerted parents to the use of the "F-word." *See id.* Nonetheless, the "2002 Billboard Music Award," unlike the 2003 version of the same show, did not include even that inadequate "L" content descriptor. So parents relying on the

was any justification for Cher's comment.[191] In light of all of these factors, we conclude that the first and third factors in our contextual analysis weigh in favor of a finding that the material is patently offensive.[192]

60. We next turn to the second factor in our contextual analysis—whether the complained-of material was sustained or repeated. Fox argues that this factor precludes a finding of indecency. As reviewed above, Commission dicta and Bureau-level decisions issued before our *Golden Globe* decision had suggested that expletives had to be repeated to be indecent but that such a repetition requirement would not apply to "descriptions or depictions of sexual or excretory functions." In this case, Cher did more than use the "F-Word" as a mere interjection or intensifier. Rather, she used the word to describe or reference a sexual act as a metaphor to express hostility to her critics. The fact that she was not literally suggesting that people engage in sexual activities does not necessarily remove the use of the term from the realm of descriptions or depictions. This case thus illustrates the difficulty in making the distinction between expletives on the one hand and descriptions or depictions on the other. Particularly in light of this lack

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ratings would not have expected even mild "coarse" language, much less the "F-Word."

[191] For instance, Fox does not contend that Cher's comment had any artistic merit or was necessary to convey any message.

[192] Fox's argument that it did not present Cher's comment for "shock value" misunderstands the contextual analysis employed by the Commission, under which "we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster." *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6657-58 ¶ 12.

of clarity, we acknowledge that it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast. This case also shows that the inquiry into whether a word is used an expletive rather than a description or depiction is wholly artificial. Whether used as an expletive, or as a description or depiction, the offensive nature of the "F-Word" is inherently tied to the term's sexual meaning.

61. In any event, under our *Golden Globe* precedent, the fact that Cher used the "F-Word" once does not remove her comment from the realm of actionable indecency.[193] We stated in *Golden Globe* that the "mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[194] To be sure, the fact that material is not repeated does weigh against a finding of indecency, and in certain cases, when all of the relevant factors are considered together, this factor may tip the balance in a decisive manner. This, however, is not one of those cases.

62. We believe that Cher's use of the "F-Word" here during a program aired in prime time was patently offensive under contemporary community standards for the broadcast medium. The patent offensiveness is compounded by the fact that the warnings accompanying the broadcast were inadequate and misleading.[195] We do not believe that the Commission should ignore "the first blow" to the television audience in the particular circum-

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[193] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12.

[194] *Id.*

[195] *See supra* para. 59.

stances presented here.[196] Our determination, moreover, is consistent with the networks' own broadcast standards during the "safe harbor," which would not allow the broadcast of a single use of the "F-Word" under these circumstances.[197] Such standards reflect the networks' recognition that even a single use of the "F-Word" under most circumstances is not consistent with contemporary community standards for the broadcast medium. Indeed, Fox edited out Cher's comment in its broadcasts to the Mountain and Pacific Time Zones.

63. In sum, we conclude that, given the explicit, graphic, vulgar, and shocking nature of Cher's use of the "F-Word," Fox's broadcast was patently offensive under contemporary community standards for the broadcast medium.

64. Fox also argues that it should not be held responsible for airing Cher's comment. In particular, Fox argues that Cher's remarks were unscripted and that the five-second delay and editing system that it used for "The 2002 Billboard Music Awards" previously had been effective in preventing the airing of objectionable material.[198] We need not address these arguments, however, because we decide that it would not be equitable to sanction Fox for a different reason. Specifically, as discussed above, it was not clear at the time that broadcasters could be punished for the kind of comment at issue here.[199]

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[196] *Pacifica*, 438 U.S. at 748-49.

[197] *See supra* para. 29.

[198] *See* Fox Response to 9/7/06 LOI at 4-6, 10.

[199] *See supra* para. 60; *see also Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

65. *Profanity Analysis.* Consistent with our decisions in the *Golden Globe Awards Order* and the *Omnibus Order*, we also find that Cher's use of the "F-Word" in the program at issue violated Section 1464's prohibition on the broadcast of "profane" utterances.[200] In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of Section 1464 because, in context, it constituted vulgar and coarse language "'so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'"[201] In certain cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[202] However, such circumstances are not present here: Fox does not contend that Cher's profane language was essential to informing viewers on a matter of public importance or that modifying the language would have had a material impact on its function as a source of news and information. On the contrary, Fox maintains that it attempted to delete the profane language, and did remove it before the program aired on time delay in the Mountain and Pacific Time Zones.[203] It is undisputed that the "F-Word" was broadcast within the 6 a.m. to 10 p.m. time frame relevant to

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[200] 18 U.S.C. § 1464.

[201] *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 13, *quoting Tallman*, 465 F.2d at 286.

[202] *Omnibus Order* at 2669 ¶ 19, *citing Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

[203] Fox Response to 9/7/2006 LOI at 10.

a profanity determination.[204] Because it was broadcast at a time of day when there was a reasonable risk of children's presence in the audience (indeed, as detailed above, over two-and-a-half million viewers of the broadcast were under the age of 18),[205] the broadcast is legally actionable.

66. *No Sanction Proposed.* For the reasons stated above, we conclude that "The 2002 Billboard Music Awards" contained indecent and profane material in violation of Section 1464 and our rules. Fox stations broadcast indecent and profane language in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. Under the circumstances, however, we find that no forfeiture is warranted in this case for the reason set forth above.[206] In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications, and we will not consider the broadcast to have an adverse impact upon such licensees as part of the renewal process or in any other context.[207]

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[204] *See Omnibus Order*, 21 FCC Rcd at 2666 ¶ 8.

[205] *See supra* para. 59 (noting that, according to Nielsen ratings data, 27.9% of the people watching an average minute of "The 2002 Billboard Music Awards" broadcast were under 18, and 12.7% were between the ages of 2 and 11); *see also Pacifica*, 438 U.S. at 749-50 (discussing government's interest in protecting children from "offensive expression")

[206] *See supra* para. 64. In light of our decision not to impose a forfeiture, we need not address whether the violations of Section 1464 and our rule were willful within the meaning of Section 503(b).

[207] The constitutional arguments raised by the Networks relating to the application of our indecency framework to "The 2002 Billboard Music Awards" are the same as the constitutional arguments that we

C. "The Early Show"

67. "The Early Show" is a two-hour morning program that airs weekdays on the CBS Television Network. On December 13, 2004, the program devoted significant coverage to discussion of the CBS program "Survivor: Vanuatu," which had crowned its winner the prior evening. As part of that coverage, "The Early Show" co-host Julie Chen conducted a live interview with the final four contestants from "Survivor: Vanuatu." During that interview, Ms. Chen asked runner-up Twila Tanner whether she agreed with fourth-place finisher Eliza Orlins that Chris Daugherty, the winner of the program, would have prevailed had he been matched up in the finals against Ms. Orlins. Ms. Tanner then responded, "Not necessarily. I knew he was a bullshitter from Day One."

68. A viewer subsequently filed a complaint with the Commission that Station KDKA-TV, Pittsburgh, Pennsylvania, which is licensed to CBS Broadcasting Inc., aired Ms. Tanner's comment at approximately 8:10 a.m. Eastern Standard Time, on December 13, 2004, and alleged that the comment was indecent and profane.[208] In response to the Commission's letter of inquiry, CBS does not deny that the comment in question was broadcast on KDKA-TV.[209] However, CBS argues, among

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have already addressed with respect to the "2003 Billboard Music Awards" broadcast. We reject those arguments for the same reasons given above. *See supra* para. 42-52.

[208] FCC File No. EB-05-IH-0007.

[209] *See* Letter From Robert Corn-Revere, Counsel to CBS, to Marlene H. Dortch, Secretary, FCC, File No. EB-05-IH-0007 (Sept. 21, 2006), at 1 ("CBS Response to 9/7/2006 LOI").

other things, that the material is not actionable because it was spoken during a *bona fide* news interview.[210]

69. In the *Omnibus Order*, we "recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee."[211] Indeed, when we denied an indecency complaint regarding material that was aired during "The Today Show," which is a competitor of "The Early Show," we reiterated the need for the Commission to exercise caution with respect to news programming.[212]

70. This restrained approach is consistent with a long line of Commission precedent. For example, in *Peter Branton*, the Commission held that an NPR news story on John Gotti, which included a wiretap of a conversation in which Gotti repeatedly used variations of the "F-Word," was not indecent because "it was an integral part of a bona fide news story."[213] The Commission explained that "we traditionally have been reluctant to intervene in the editorial judgments of broadcast licens-

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[210] *See id.* at 4.

[211] *Omnibus Order*, 21 FCC Rcd at 2668 ¶ 15.

[212] *Id.* at 2717 ¶ 218.

[213] *Peter Branton*, 6 FCC Rcd at 610. *See Infinity Broadcasting Corp. of Pennsylvania*, Memorandum Opinion and Order, 3 FCC Rcd 930, 937 n. 31 (1987), *vacated on other grounds sub nom. ACT I*, (noting that "context will always be critical to an indecency determination and . . . the context of a bona fide news program will obviously be different from the contexts of the three broadcasts now before us, and, therefore, would probably be of less concern."); *Indecency Policy Statement*, 16 FCC Rcd at 8002-03 (stating that "[e]xplicit language in the context of a bona fide newscast might not be patently offensive.").

ces on how best to present serious public affairs programming to their listeners."[214]

71. In today's Order, we reaffirm our commitment to proceeding with caution in our evaluation of complaints involving news programming. To be sure, there is no outright news exemption from our indecency rules.[215] Nevertheless, in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming.

72. Some critics have questioned whether the segments of "The Early Show" devoted to "Survivor: Vanuatu" are legitimate news programming or instead are merely promotions for CBS's own entertainment programming.[216] CBS nevertheless maintains in its LOI

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[214] *Peter Branton*, 6 FCC Rcd at 610.

[215] *See, e.g., Evergreen Media Corporation of Chicago AM*, Memorandum Opinion and Order, 6 FCC Rcd 5950, 5951 (Mass Media Bur. 1991) (finding talk show segment discussing pornographic photographs of Vanessa Williams to be indecent and concluding that "[e]ven if it had been argued that the [show] in question was comparable to a news program, the Vanessa Williams segment contained vulgar material presented in a pandering and titillating manner unlike anything found in the *Branton* case."); *Pacific and Southern Company Inc. (KSD-FM)*, Notice of Apparent Liability, 6 FCC Rcd 3689 (Mass Media Bur. 1990) (forfeiture paid) (finding that "exceptionally explicit and vulgar" material that was "presented in a pandering manner" was indecent even though it "arguably concerned an incident that was at the time 'in the news.'").

[216] *See, e.g.*, Howard Rosenberg, *The Fact Is, the Joke is the News*, Broadcasting & Cable, Nov. 1, 2004, at 32 ("Even more common is the venerable, widespread practice of cross-promotion, as on The Early Show, a production of CBS News, which each Friday devotes a lengthy segment to 'covering' the previous night's Survivor episode on the

response that its interview of the "Survivor: Vanuatu" contestants was a "*bona fide* news interview." "The Early Show" is produced by CBS News and addressed a variety of other topics that morning, including a suicide bombing in Iraq, the withdrawal of Bernard Kerik as a candidate to serve as Secretary of Homeland Security, and the apparent poisoning of then-Ukrainian opposition leader Viktor Yushchenko, which clearly fall under the rubric of news programming. In light of these factors and our commitment to exercising caution in this area, we believe it is appropriate in these circumstances to defer to CBS's plausible characterization of its own programming. Accordingly, we find that, in the *Omnibus Order*, we did not give appropriate weight to the nature of the programming at issue (i.e., news programming).

73. Turning to the specific material that is the subject of the complaint, we can certainly understand that viewers may have been offended by Ms. Tanner's coarse language. Nevertheless, given the nature of her comment and our decision to defer to CBS's characterization of the program segment as a news interview, we conclude, regardless of whether such language would be actionable in the context of an entertainment program, that the complained-of material is neither actionably indecent nor profane in this context. Accordingly, we deny the complaint.

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network, as if who got bumped off was an actual news story. As a bonus, The Early Show folds itself into this fantasy from a special set outfitted to resemble Survivor.").

D. "NYPD Blue"

74. As discussed above, the Commission received complaints regarding several "NYPD Blue" episodes that aired on KMBC-TV, Kansas City, Missouri, and other unidentified ABC Television Network affiliates beginning at 9:00 p.m. Central Standard Time, in which the "S-Word" was used.[217] In the *Omnibus Order*, the Commission found those broadcasts containing the "S-Word" to be apparently indecent and profane.[218] In its response to the Commission's letter of inquiry, KMBC Hearst-Argyle Television, Inc. ("Hearst"), licensee of KMBC-TV, does not dispute that it aired the complained-of material. Hearst argues, however, that the complaints should either be dismissed on procedural grounds or denied on the merits.

75. Raising an argument that we did not previously consider, Hearst contends that the Commission should dismiss the complaints as insufficient under the enforcement policy set forth in the *Omnibus Order*.[219] One complaint was filed against each of the "NYPD Blue" broadcasts at issue, and each of these complaints was filed by the same person. All of these complaints stated that the complained-of broadcast "originally aired at 9:00 p.m. CST on Kansas City affiliate KMBC" and was "also seen in homes across the country on ABC affiliates."[220] How-

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[217] FCC File No. EB-03-IH-0355.

[218] *Omnibus Order*, 21 FCC Rcd at 2696-98 ¶¶ 125-36.

[219] KMBC Hearst-Argyle Television, Inc. Response to Letter of Inquiry and Memorandum of Law, File No. EB-03-IH-0355 at 8 (Sept. 21, 2006) ("Hearst Response to 9/7/2006 LOI").

[220] *See* Letters from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC, to David Solomon, Chief, Enforcement Bureau, dated July 1 and July 3, 2003.

ever, as Hearst accurately maintains, none of the complaints was filed by anyone residing in the market served by KMBC-TV. Nor were any of the complaints filed by anyone residing in a market where the complained-of material aired outside of the 10:00 p.m.-6:00 a.m. safe harbor. Instead, each complaint was filed by the same individual from Alexandria, Virginia, where, as Hearst points out,[221] the material was aired during the safe harbor.[222] In addition, none of the complaints contains any claim that the out-of-market complainant actually viewed the complained-of broadcasts on KMBC-TV or any other ABC affiliate where the material was aired outside of the safe harbor.[223] Thus, there is nothing in the record either to tie the complaints to Station KMBC-TV's local viewing area (or the local viewing area of any station where the material was aired outside of the safe harbor), or to suggest that the broadcast programming at issue was the subject of complaints from anyone who viewed the programming on any station that aired the material outside of the safe harbor.

76. We therefore agree with Hearst that we should dismiss the complaints regarding "NYPD Blue" pursuant to the enforcement policy that we announced in the *Omnibus Order*. There, the Commission stated that it would propose forfeitures only against licensees and stations whose broadcasts of actionable material were the subject of a viewer complaint filed with the Commis-

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[221] Hearst Response to 9/7/2006 LOI at 11, n.9.

[222] *See supra* note 217 and accompanying text. The letterhead of each complaint identified contact information for PTC's office in Alexandria, Virginia, as well as a PTC office in Los Angeles, California.

[223] *See id.*

sion,[224] explaining that "[i]n the absence of complaints concerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained about that program."[225] In addition to demonstrating appropriate restraint in light of First Amendment values, this enforcement policy preserves limited Commission resources, while still vindicating the interests of local residents who are directly affected by a station's airing of indecent and profane material.

77. Based on consideration of Hearst's arguments, we agree that consistent application of our restrained enforcement policy requires us to apply the same approach to this case that we applied to the notices of apparent liability in the *Omnibus Order*. While this case does not involve the imposition of forfeitures against KMBC-TV or any other licensee, the sufficiency of a complaint is the first step rather than the last step in the Commission's analysis. Thus, as Hearst puts it, "[o]nly the dismissal of the NYPD Blue complaints will bring [this case] into harmony with the Commission's announced enforcement policy."[226] Accordingly, we dismiss these complaints.

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[224] *Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32, 2676 ¶ 42, 2687 ¶ 86.

[225] *Id.* at 2687 ¶ 86. *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30 (under the enforcement policy announced in the *Omnibus Order*, "it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations.").

[226] Hearst Response to 9/7/2006 LOI at 11.

IV. ORDERING CLAUSES

78. Accordingly, IT IS ORDERED that Section III.B of the *Omnibus Order* is VACATED in its entirety.

79. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "The 2003 Billboard Music Awards" and "The 2002 Billboard Music Awards" are GRANTED to the extent set forth herein and OTHERWISE DENIED.

80. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "The Early Show" are DENIED.

81. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "NYPD Blue" are DISMISSED.

82. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Susan L. Fox, Esq., Vice President, Government Relations, The Walt Disney Company, 1150 17th Street, N.W., Suite 400, Washington, D.C. 20036.

83. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to John W. Zucker, Esq., Senior Vice President, Law-Regulation, ABC, Inc., 77 West 66th Street, New York, N.Y. 10024.

84. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Seth Waxman, Esq., Counsel to The Walt Disney Company, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, 2445 M Street, N.W., Washington, D.C. 20037.

85. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Anne Lucey, Esq., Senior Vice President, Regulatory Policy, CBS Corporation, 601 Pennsylvania Ave., N.W., Suite 540, Washington, DC 20004.

86. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Robert Corn-Revere, Counsel to CBS Corp., Davis Wright Tremaine, LLP, 1500 K Street, N.W., Suite 450, Washington, D.C. 20005-1272.

87. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Mark J. Prak, Esq., Counsel to Hearst-Argyle Television, Inc., Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, 150 Fayetteville Street, Suite 1600 Wachovia Capitol Center, Raleigh, North Carolina 27601.

88. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Maureen A. O'Connell, Esq., News Corporation, 444 North Capitol Street, N.W., Suite 740, Washington, D.C. 20001.

89. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to John Quale, Esq., Counsel to Fox Television Stations, Inc., Skadden, Arps, Slate, Meagher & Flom, LLP, 1440 New York Ave., N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN CONCURRING IN PART, DISSENTING IN PART

Re: Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Order

Today's *Order* is pursuant to a grant from the United States Court of Appeals for the Second Circuit of the Commission's voluntary remand request to reconsider portions of the March 15, 2006, *Omnibus Order*.[1] In that decision, I concurred in part and dissented in part because I believed the Commission had failed to develop a consistent and coherent indecency enforcement policy. It was my hope that the Commission would use this remand to clarify and rationalize our indecency regime,[2] but regulatory convenience and avoidance have prevailed instead. I am, therefore, compelled again to concur in part and dissent in part.

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[1] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*").

[2] Today's decision presumes that the general statement that the Commission's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens," *and nothing more*, is sufficient to inform the public and broadcasters what we believe are the national, contemporary community standards of the broadcast medium. *In re Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004); *compare, Reno v. ACLU*, 521 U.S. 844 (1997) (finding the terms "indecent", "patently offensive" and "in context" were so vague that criminal enforcement would violate the fundamental constitutional principles, but while recognizing "the history of extensive government regulation of broadcasting").

The proverbial "elephant in the room" looming over today's decision is the *Golden Globe Awards Order*,[3] which inexplicably has been pending reconsideration for more than two and one-half years. While the Commission has simply refused to review the *Golden Globe* case, we have relied upon, expanded and applied it more than any other indecency case in the past two years. As the foundational basis for the Commission's decision in the cases involved in this remand, we should review and finalize this watershed decision.[4]

As I stated in the *Omnibus Order*, "by failing to address the many serious concerns raised in the *Golden Globe Awards* case, before prohibiting the use of additional words, we fall short of meeting the [appropriate] constitutional standard and walking the tightrope of a restrained enforcement policy."[5] Today, we fail again. Litigation strategy should not be the dominant factor guiding policy when First Amendment protections are at stake.

In its remand request, the Commission asked the Second Circuit for an opportunity to consider the con-

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[3] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), *reversed*, 19 FCC Rcd 4975 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending* (since April 2004).

[4] *Golden Globe Awards Order* at ¶¶ 9, 12 and 14 (eviscerating our longstanding standard for "isolated or fleeting" expletives, establishing that any use of the "F-word" or a variation, in any context, "invariably invokes a coarse sexual image," and changing our 30-year standard of what constitutes profanity).

[5] *Omnibus Order*, Statement of Commissioner Jonathan S. Adelstein, concurring in part, dissenting in part, 21 FCC Rcd *at* 2726.

cerns of broadcasters before issuing a final decision. Yet squandering this opportunity, the Commission fails to consider fully all concerns relating to an August 22, 2003, complaint against the December 9, 2002, broadcast of "The Billboard Music Awards" by WTTG(TV) in Washington, D.C. This *Order* does not adequately address the Enforcement Bureau's December 18, 2002, decision letter, which denied the same complaint on the merits.[6] No one filed either a petition for reconsideration or an application for review and, consequentially, the decision letter became a final order. It seems patently unfair for the Commission to re-adjudicate the same complaint, involving the same parties on the same cause of action, first in the initial decision letter, then in the *Omnibus Order*, and then again in today's *Order*. The Supreme Court has held that the principle of *res judicata* applies to an adjudicative administrative proceeding where the agency has properly resolved disputes of fact and the parties have had an adequate opportunity to litigate.[7] The Commission should not have re-adjudicated this complaint a second time in the *Omnibus Order*. Certainly today, the third time around, this complaint should be dismissed, or the Commission should reverse the Enforcement Bureau's decision letter and the resultant final order.

More broadly, today's *Order* notes that the Supreme Court in *Pacifica* stressed context and we have repeatedly said "the full context in which the material ap-

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[6] The decision letter dismissing a complaint against the December 9, 2002, broadcast of "The Billboard Music Awards" by WTTG (TV), Washington, D.C., was referenced in footnote 32 of the *Golden Globe Awards Order*, and in footnote 9 of my Statement in that *Order*.

[7] *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394, 422 (1966).

peared is critically important." Yet the Commission's analyses of the 2002 and 2003 broadcasts of "The Billboard Music Awards" are limited exclusively to a few seconds of a two-hour program. No consideration whatsoever is given to the entirety of the program. While it is perfectly reasonable to conclude that, after considering the entire program, the vulgarity and shock value of a particular scene permeated and dominated the program, the Commission should consider the totality of the program, rather than limit our consideration to an isolated programming segment.

Similarly, the Commission's justification for denying the complaint against the December 12, 2004, broadcast of "The Early Show," and reversing its indecency and profanity findings reflect the arbitrary, subjective and inconsistent nature of the Commission's decision-making.[8] In the *Omnibus Order*, the Commission concluded that the use of the s-word was shocking "*particularly* during a morning news interview,"[9] and that this "vulgarity in a morning television interview is *of particular concern* and *weighs heavily* in our analysis."[10] Today, without any legal support found in American jurisprudence, the Commission, *sua sponte*, creates a new "plau-

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[8] In the *Omnibus Order*, with respect to "The Early Show," the Commission said: "In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance. We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here." *Omnibus Order*, ¶ 144.

[9] *See Omnibus Order*, 21 FCC Rcd at 2699 ¶ 141 [emphasis added].

[10] *Id.* [emphasis added].

sible"[11] standard to determine the threshold question of whether a particular program segment qualifies as a "*bona fide* news interview."[12] While the Commission admits that "there is no outright news exemption from our indecency rules," it will nevertheless defer to a broadcaster's "plausible characterization of its own programming." I not only fail to find a legal basis for the Commission's latest invention,[13] I also fail to understand the justification for such a shift in reasoning. While the creation of this "infotainment" exception that can be invoked by a broadcaster's plausible characterization" may be convenient in this order today, it will surely create unintended consequences in future cases.

Even as applied, this new "plausible" standard is problematic. In this case, the CBS "Early Show" interview of contestants from the CBS program "Survivor: Vanuatu" was a cross promotion of a network's primetime entertainment programming on the same network's morning show. It stretches the bounds to argue this is legitimate news or public affairs programming. It is unreasonable to say that the latest contestant to be voted off the island or the latest contestant to hear "you're fired" or even "come on down" is "serious public affairs programming."[14] The network creates its own "reality" on a reality show, and we are somehow to be-

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[11] ¶ 72, supra.

[12] *Id.* [emphasis in original].

[13] Looking at this contorted reasoning one must wonder whether the Commission is attempting to avoid reconsideration of its policy enunciated in the *Omnibus Order* that, consistent with *Golden Globe*, any variant, of the S-word is inherently excretory. *Omnibus Order* at 2699 ¶ 139.

[14] *Peter Branton*, 6 FCC Rcd 610 (1991).

lieve that developments within its own artificial world are news? The only news here is how far this Commission is willing to stretch the definition of "news."

I also dissent in part from the Commission's decision to dismiss numerous complaints against several nationally televised episodes of the ABC network program "NYPD Blue" because the complaints did not come from viewers who resided in the station's media market. While the Commission has not changed its decision on the merits of the complaints, it has relied on an arbitrary procedural change in our enforcement policy that creates an unnecessary disconnect between the basis of our indecency authority and our enforcement policy, and encourages letter-writing campaigns, which will further burden Commission resources.

The Commission has long maintained, and does not now dispute, that we enforce a national, contemporary community standard, not a local one. For instance, in an effort to justify its authority in today's *Order*, the Commission observes that the broadcast medium has a "special nature" and "a uniquely pervasive presence in American life."[15] The Commission points out the "the Supreme Court emphasized the 'pervasive presence [of the broadcast medium] in the lives of all Americans' and that indecent broadcasts invade the privacy of the home."[16] Yet, the Commission's new enforcement policy is inconsistent with the national standard we impose and the pervasiveness of the medium we regulate.

This new enforcement policy is also inconsistent with the Commission's reasoning in other sections of today's

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[15] *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[16] *See id.*, citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970).

Order. For example, as an important factor weighing in support of its finding that the 2002 and 2003 broadcasts of "The Billboard Music Awards" are indecent, the Commission cites Nielsen rating data on the total number of children under 18 and children between ages 2 and 11 who watched the programs, nationally. Yet based on our enforcement policy, the Commission will actually only protect children in the particular local media market where there is a complaint.[17]

The consequences of this new policy reveal its lack of logic. When the Commission determines a *national* network broadcast violates our *national* community standards, we will only fine the *local* station that has a complaint filed against it by a viewer in its media market. Although our obligation is to enforce the law to protect all children, we will only fine a local station that has the misfortune of being in a market where a parent or an adult made the effort to complain. This policy is misguided because a sufficient and valid complaint is truly the first, and an important, step in our indecency enforcement regime. The complaint and the complainant serve an important role, but the real party in interest is the Commission, acting on behalf the public, rather than the specific individual or organization that brings allegedly indecent material to our attention.

According to the new enforcement policy, even after we have determined the complained-of material is indecent, we will willfully blind ourselves to the potentially millions of children and households that watched the indecent program. The new policy would fine only the local station and only if the complainant is in its cover-

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[17] *Order*, ¶¶ 18, 59 and 65.

age area. Other stations will essentially be "sitting ducks," waiting for an in-market viewer to file a complaint about the same program, in order for the Commission to act. I do not understand how we can say we are faithfully enforcing the law when we are aware of violations of the law that we simply choose to ignore.

This is not the restrained enforcement policy encouraged by the Supreme Court in *Pacifica*.[18] Restraint applies to the standard we use in our decision-making and the manner in which we decide what constitutes actionable, indecent material.[19] Restraint applies to the development of a coherent framework that is based on rational and principled distinctions.

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[18] *Pacifica*, 438 U.S. at 763, POWELL J, *concurring in part and concurring in judgment.*

[19] The Commission claims that "the sufficiency of a complaint is the first step rather that the last step in the Commission's analysis." *Order*, ¶ 77. However, in the single complaint filed against the "The 2002 Billboard Music Awards," for example, the complainant does not even aver that she watched the program. Quite the contrary, the complaint was filed "on behalf of the Parents Television Council and its over 800,000 members." The complainant alleges, the broadcast "was seen in homes across the country on the Fox network, and in Washington DC." Based on the Commission's reasoning in today's *Order* and the *Golden Globe Awards Order*, this complaint does not state a *prima facie* case to justify Commission action. *See Order*, ¶¶ 40 and 65 (stating that "[i]n the *Golden Globe Awards Order*, the Commission concluded that the F-Word was profane within the meaning of Section 1464 because, in context, it contained vulgar and coarse language 'so grossly offensive to members of the public who *actually hear* it as to amount to a nuisance'") (emphasis added). *See also Order*, ¶ 75 (stating that complaints against "NYPD Blue" are justifiably dismissed because "none of the complaints contains any claim that the out-of market complainant actually viewed the complained-of broadcasts") (emphasis added).

The power to limit speech should be exercised responsibly, and with the utmost caution. While I agree with some aspects of today's *Order*, I respectfully cannot support our reasoning. For that reason, I concur in part and dissent in part.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NUMBERS: 06-1760-ag (L),
06-2750-ag (CON), 06-5358-ag (CON)

FOX TELEVISION STATIONS, INC., CBS BROADCASTING, INC., WLS TELEVISION, INC., KTRK TELEVISION, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, RESPONDENTS,

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., DOING BUSINESS AS CENTER FOR CREATIVE VOICES IN MEDIA, INC., ABC TELEVISION AFFILIATES ASSOCIATION, INTERVENORS

[Filed: June 4, 2007]
[Issued as Mandate: July 7, 2007]

JUDGMENT

Before: Hon. PIERRE N. LEVAL, Hon. ROSEMARY S. POOLER, Hon. PETER W. HALL, *Circuit Judges*.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of June, two thousand and seven.

Petitions for review of an order from the Federal Communications Commission.

This cause came on to be heard on the transcript of record from the Board of Immigration Appeals and was submitted by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the petitions for review of said Federal Communications Commission be and they hereby are GRANTED, the order of the FCC is VACATED, and the matter is REMANDED for further proceedings in accordance with the opinion of this Court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
Clerk

by

/s/ TRACY W. YOUNG
TRACY W. YOUNG
Motions Staff Attorney

APPENDIX D

1. 18 U.S.C. 1464 provides:

Broadcasting obscene language

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.

2. 47 U.S.C. 312 provides in relevant part:

Administrative sanctions

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission

authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 Title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Cease and desist orders

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

* * * * *

3. 47 U.S.C. 503 provides in relevant part:

Forfeitures

* * * * *

(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period

(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be

in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

* * * * *

4. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, provides:

FCC REGULATIONS.—The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act.

5. 47 C.F.R. 73.3999 provides:

Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).

(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.

(b) No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.

OPPOSITION BRIEF

FILED
FEB 1 - 2008
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SUPREME COURT, U.S.

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(2)

No. 07-582

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.

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Counsel for Respondents NBC Universal, Inc. and NBC Telemundo License Company

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Commission had failed to explain adequately the abrupt reversal of its longstanding determination that fleeting and isolated utterances of expletives generally fall outside the Commission's definition of broadcast indecency.

RULE 29.6 STATEMENT

NBC Universal, Inc. operates the NBC and Telemundo broadcast networks, as well as nonbroadcast television networks. NBC Universal, Inc. is owned by National Broadcasting Company Holding, Inc. (which is a wholly owned subsidiary of General Electric Company) and by Vivendi Universal, S.A., a publicly traded company.

NBC Telemundo License Company is the licensee or controlling parent entity of the licensees of several full-power, television broadcast stations. It is a wholly owned subsidiary of NBC Telemundo, Inc., which is owned by both NBC Telemundo Holding Company (a wholly owned subsidiary of General Electric Company), and by NBC Universal, Inc.

General Electric Company has no parent company, and no publicly held company owns 10 percent or more of its stock.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 489 F.3d 444. Pet. App. 1a–60a. The order of the Federal Communications Commission is reported at 21 F.C.C.R. 13,299. Pet. App. 61a–142a.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2007. Justice Ginsburg twice extended the time within which to file a petition for certiorari, the first time on August 23, 2007, to and including October 4, 2007, and then again on September 24, 2007, to and including November 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case involves nothing more than a routine application of a foundational principle of administrative law: that, under the Administrative Procedure Act (APA), when an agency undertakes "a reversal of policy," it must "adequately explain[] the reasons" for the change. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

For 30 years, the Commission held that fleeting utterances of expletives generally fell outside its definition of indecent material because they did not depict or describe sexual or excretory activities. In the rare instance in which the "F-Word" or the "S-Word" was used literally to describe sexual or excretory activity, the fleeting nature of the utterance ordinarily compelled a finding that it was not "patently offensive." In the Order at issue here, the Commission has reversed course entirely, deeming any and every use of the "F-Word" and the "S-Word"

to fall within the subject matter scope of its indecency definition and to be presumptively "patently offensive." As the court of appeals correctly concluded, the Commission proffered no reasonable explanation for this fundamental change in more than 30 years of agency policy. The court of appeals also correctly remanded the proceedings to the Commission so that it could try again.

The court of appeals' remand to the Commission does not warrant this Court's review. There is no division among the court of appeals concerning the principle of administrative law at issue here; the Commission disputes only its application. But this Court generally does not grant review to engage in "error correction." Moreover, an opportunity to attempt to produce an explanation that meets the requirements of the APA remains open to the Commission on remand.

1. The Commission's authority to regulate the content of over-the-air broadcasts dates back to 1927. Section 29 of the Radio Act of 1927 provided that "[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communications." Radio Act of 1927, ch. 169, 44 Stat. 1173. The statute, relocated to the criminal code, currently provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (2006).

In the early decades of the content restriction's existence, the Commission did not directly enforce it; the Commission mentioned the statute only very rarely in the context of license renewals, and it adopted a restrained enforcement approach. Indeed, the Commission did not seek to impose a forfeiture

on a licensee for violation of Section 1464 *until 1970. See In re WUHY-FM*, 24 F.C.C.2d 408 (Apr. 3, 1970).

The landscape changed in 1975 with the Commission's decision against Pacifica Foundation for its broadcast of comedian George Carlin's "Filthy Words" monologue. The monologue was a 12-minute routine in which Carlin listed "'the words you couldn't say on the public . . . airwaves'"—"'shit, piss, fuck, cunt, cocksucker, motherfucker, and tits'"—and "proceeded to list those words and repeat them over and over again in a variety of colloquialisms." *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978). In its initial decision, the Commission articulated the following definition of broadcast indecency: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *In re Citizen's Complaint Against Pacifica Found. Station WBAI*, 56 F.C.C.2d 94, 97–98 ¶ 11 (Feb. 12, 1975). The Commission concluded that Carlin's monologue violated that standard.

Conceding that the "Filthy Words" monologue fit within the Commission's definition of indecent material, the broadcaster challenged the sanction on statutory and First Amendment grounds. Recognizing that the words used in Carlin's monologue were "not entirely outside the protection of the First Amendment," and that even Carlin's "monologue would be protected in other contexts," this Court narrowly upheld the Commission's sanction. The Court emphasized, however, the "narrowness of [its] holding," and stated it "ha[d] *not* decided that an occasional expletive . . . would justify any sanction," much less "a criminal prosecution." *Pacifica*, 438

U.S. at 746, 750 (emphasis added). But "Filthy Words" was tantamount to "verbal shock treatment." *Id.* at 760–61 (Powell, J., concurring).

In the years that followed, the Commission brought enforcement actions only against *sustained and repeated* uses of the "seven particular words that were broadcast in [the] George Carlin monologue." *New Indecency Enforcement Standards*, Public Notice, 2 F.C.C.R. 2726, 2726 (Apr. 29, 1987). Indeed, it expressly disclaimed any authority to adjudge a broadcast "indecent" based on the broadcast of a single expletive: "If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, *deliberate and repetitive use* in a patently offensive manner is a *requisite* to a finding of indecency." *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (Apr. 29, 1987) (emphases added). Its content restriction was *not* aimed at programs that contained "merely an occasional . . . expletive, but instead" at content that "dwelt on sexual or excretory matters in a pandering and titillating fashion." *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 933 ¶ 20 (Dec. 29, 1987). Over the next several years, the Commission repeatedly ruled that the utterance of a single, fleeting expletive was not indecent. *E.g.*, *In re Applications of Lincoln Dellar*, 8 F.C.C.R. 2582, 2585 ¶ 26 (Audio Servs. Div. Apr. 6, 1993).

In 2001, pursuant to a settlement agreement in which the Commission agreed to clarify its indecency policy, the Commission issued an indecency policy statement intended to "provide guidance" to the broadcast community. *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8016 ¶ 30 (Apr. 6,

2001) ("*Industry Guidance*").[1] Echoing its decision in *Pacifica*, the Commission set out a two-part test for broadcast indecency: (1) "the material must describe or depict sexual or excretory organs or activities," and (2) it must be "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶¶ 7–8. In measuring the offensiveness of any particular broadcast—the second step of its test for indecency—the Commission informed broadcasters that it would look to three factors: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*." *Id.* at 8003 ¶ 10.

In accordance with that two-part definition, the *Industry Guidance* cites several cases where the disputed broadcast was determined not to be indecent either because the language, in context, did not have an "'inescapab[y]'" "sexual import,'" or because the sexual or excretory reference was "fleeting and isolated." *Id.* at 8006, 8008–09 ¶¶ 15, 18 (citing cases); *see also id.* at 8008 ¶ 17 ("where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency"). As suggested by the focus on "patent offensiveness"—

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[1] The 2001 *Industry Guidance* document was published pursuant to a *1994* settlement agreement resolving a broadcaster's *1992* vagueness challenge to the Commission's indecency standard. *See Industry Guidance*, 16 F.C.C.R. at 8016 n.23; *see also U.S. v. Evergreen Media Corp. of Chi.*, 832 F. Supp. 1183 (N.D. Ill. 1993).

the second step of its test—the Commission also stressed that indecency determinations may be "highly fact-specific" and that "the *full* context in which the material appeared is critically important." *Id.* at 8002–03 ¶ 9.

2.a. The Commission's approach to fleeting expletives changed abruptly and dramatically after NBC's 2003 live broadcast of the *60th Annual Golden Globe Awards*. Accepting an award, Bono exclaimed: "'This is really, really, fucking brilliant. Really, really great.'" *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (Mar. 18, 2004) (*Golden Globe II*). The Commission received 234 complaints alleging that the live broadcast was "obscene and/or indecent." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19,859, 19,859 ¶ 2 (E.B. Oct. 3, 2003) ("*Golden Globe I*"). All but 17 of the 234 complaints were mass-generated by the Parents Television Council. *Id.* at 19,859 n.1.[2]

The Commission's Enforcement Bureau denied all of the complaints. *Golden Globe I*, 18 F.C.C.R. at 19,862 ¶ 7. Applying the indecency standard as it had long been understood, the Bureau held that although "[t]he word 'fucking' may be crude and offensive . . . in the context presented here, [it] *did not de-*

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[2] The Parents Television Council screens television programs and then blankets cyberspace with e-mails about content it finds objectionable. The mass e-mails draw traffic to the Council's website, where anyone can submit a complaint to the Commission—whether they have viewed a program or not. *See, e.g.*, Parents Television Council, *FCC Indecency Complaint Form*, http://www.parentstv.org/ptc/action/lasvegas/mainfcc.asp (last visited Jan. 30, 2008).

scribe sexual or excretory organs or activities. Rather, the performer used the word 'fucking' as an adjective or expletive to emphasize an exclamation." *Id.* at 19,861 ¶ 5 (emphasis added). The Bureau also noted the Commission's consistent view that "fleeting and isolated remarks of this nature do not warrant Commission action." *Id.* at 19,861 ¶ 6.

The Commission reversed the Bureau's decision and introduced a fundamentally new interpretation of its indecency standard. *Golden Globe II*, 19 F.C.C.R. at 4975–82. Where the Enforcement Bureau analyzed whether Bono's words actually depicted or described sexual or excretory activity—as required by the first step of the Commission's test—the Commission held that "*any* use of [the 'F-Word'] or a variation, in *any* context, inherently has a sexual connotation." *Id.* at 4978 ¶ 8 (emphases added). The Commission declared that it was reversing its prior precedents holding that "isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent": "[W]e conclude that any such interpretation is no longer good law." *Id.* at 4980 ¶ 12.[3]

Broadcasters filed petitions for reconsideration. For *years*, however, the Commission took no action on those petitions, precluding judicial review while holding open the threat of enforcement based on the new standard. Even today—three-and-a-half years

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[3] Announcing a "new approach to profanity," the Commission also reversed the Enforcement Bureau's determination that Bono's exclamation was not "profane language." *Id.* at 4982 ¶ 15. Under its new approach, the Commission would regulate as "profane" all "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance," including "the 'F-Word' and those words (or variants thereof) that are as highly offensive as the 'F-Word.'" *Id.* at 4981–82 ¶¶ 13,14.

after they were filed—the Commission *still* has not acted on those petitions.

b. In 2006, while the broadcasters' petitions for reconsideration of *Golden Globe II* remained pending, the Commission issued a new ruling—*In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 2664 (Feb. 21, 2006) (Omnibus Order)—in which the Commission applied to a new set of programs the indecency and profanity standards it adopted in *Golden Globe II*. Applying its "new approach" (of which the Commission's actions had precluded judicial review) the Commission adjudicated as "indecent" and "profane" the broadcast of fleeting expletives in four programs:

- The isolated use of the word "bullshit" by New York City police detective Andy Sipowicz in episodes of ABC's *NYPD Blue*. *Id.* at 2696–98 ¶¶ 125–136.
- The single use of the word "bullshitter" during a live news interview on CBS's *The Early Show*. The word was unexpectedly used by a castaway contestant from *Survivor: Vanuatu* when referring to an unscrupulous competing contestant. *Id.* at 2698–2700 ¶¶ 137–145.
- A single, unscripted use of the phrase "fuck 'em" by the performer Cher during a live broadcast by FOX of the *2002 Billboard Music Awards*. *Id.* at 2690–92 ¶¶ 101–111.
- An unscripted moment during FOX's *2003 Billboard Music Awards* live telecast, during which presenter Nicole Richie stated, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* at 2692–95 ¶¶ 112–124.

c. Several broadcasters filed petitions for review in the court of appeals, seeking (at long last) the judicial review that the Commission had thus far managed to evade. Faced with that prospect the Commission asked the court of appeals to remand the case so that the Commission could "reconsider" its omnibus decision. Joint Mot. for Voluntary Remand, at 4 (July 5, 2006). The court of appeals did so.

On remand, the Commission changed course yet again and reached altogether new—and different—conclusions about the purported "indecency" of the very programs addressed in the original Omnibus Order. Where in the Omnibus Order the Commission opined that the word "bullshitter" used by the *Survivor: Vanuatu* contestant "invariably invokes a coarse excretory image," and that the broadcast of this word was patently offensive, indecent, and profane, "particularly during a morning news interview," in the Remand Order, the Commission concluded that the word "bullshitter" was "neither actionably indecent nor profane" *precisely because* it was broadcast as part of a news interview. The Commission suggested, however, that the word would be actionable if the expletive had been uttered during an "entertainment program." *Compare* Omnibus Order, 21 F.C.C.R. at 2699 ¶¶ 138, 139, 141 *with* Pet. App. 128a ¶ 73.

More fundamentally, unlike *Golden Globe II*, where the Commission expressly acknowledged that its decision represented a "depart[ure]" from settled "Commission and staff action[s that] have indicated that isolated or fleeting broadcasts of the 'F-Word' . . . are not indecent," 19 F.C.C.R. at 4980 ¶ 12, and the original Omnibus Order, where the Commission likewise acknowledged that "existing precedent would have permitted this broadcast," 21 F.C.C.R. at

2692 ¶ 111, on remand the Commission purported to discover a "long line of precedent" supporting its position. Pet. App. 73a ¶ 16. Even though *Golden Globe II* expressly acknowledged that it was introducing a new approach, and even though the original Omnibus Order also expressly confirmed that *Golden Globe II* had changed the law, the Remand Order dismissed those statements and concluded that it had not changed its interpretation of its indecency standard at all. Based on that revisionist reading of the regulatory history, the Commission affirmed its earlier conclusion that FOX's live broadcasts of the 2002 and 2003 Billboard Music Awards were actionably indecent and profane. Pet. App. 62a ¶ 1.

Back in front of the court of appeals, the Commission changed its tune yet again. In its brief, the Commission argued that the Remand Order "could hardly have been clearer in acknowledging" a "change in course," but maintained that "the new policy and the old policy led to the same result." FCC C.A. Br. 34, 35. But the Commission abandoned even that view by the time of oral argument, coming full circle to concede, finally and without reservation, that, in fact, in *Golden Globe II*, the Commission had indeed changed its policy with respect to fleeting expletives.

3.a. The court of appeals granted the petition for review, vacated the Remand Order, and remanded the case to the Commission for further proceedings. Pet. App. 144a. Accepting the first of the broadcasters' several administrative law, statutory, and constitutional arguments, the court of appeals held that "the Remand Order is arbitrary and capricious because the Commission's regulation of 'fleeting expletives' represents a dramatic change in agency policy without adequate explanation." Pet. App. 18a.

The court of appeals recognized that there were two aspects to the Commission's about-face: First, the Commission changed its view of the *meanings* of the F-Word and S-Word—from ones that depend on whether the words are used to "depict" or "describe" sexual or excretory activities, to ones that, "'*in any context*,'" invariably convey a depiction or description of sexual or excretory activity. Pet. App. 31a (quoting *Golden Globe II*, 19 F.C.C.R. 4975, 4978, ¶ 8) (emphasis supplied by court). Second, the Commission changed its view of the *offensiveness* of the F-Word and the S-Word—from the view that a single, isolated utterance was very unlikely to rise to the level of "patently offensive," to the view that any use of the word was presumptively patently offensive and thus "presumptively indecent and profane." Pet. App. 15a.

The court of appeals concluded that the Commission's explanation for the change in its view as to the meaning of the F-Word or S-Word was inadequate. According to the Commission, it may be "difficult . . . to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions." Pet. App. 83a. According to the court of appeals, the Commission's explanation "defie[d] any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any 'sexual or excretory' meaning." Pet. App. 29a. "[N]o reasonable person," the court of appeals observed, would have believed that President Bush was referencing excretory activities when he remarked to British Prime Minister Tony Blair "that the United Nations needed to 'get Syria to get Hezbollah to stop doing this shit.'" *Id.* Yet under the Commission's new understanding of its indecency standard, those re-

marks were deemed inescapably to "depict" or "describe" excretory activities.

The court of appeals also held that the Commission's explanation for its revised view of the offensive character of fleeting utterances of the F-Word and S-Word was inadequate. The Commission had argued that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" Pet. App. 84a (quoting *Pacifica*, 438 U.S. at 748–49). This argument, the court of appeals explained, gave no explanation for "why [the Commission] has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." Pet. App. 25a. Moreover, the Commission's willingness to "subject[] viewers to the same 'first blow'" when it deemed the program to have sufficient social value (such as *The Early Show*'s interview of a reality-show contestant and the film *Saving Private Ryan*) undermined the Commission's new contention that "mere exposure to this language" caused harm. *Id.* at 27a. Thus, the court of appeals concluded, the Commission had failed "to provide the reasoned explanation necessary to justify [its] departure from established precedent." *Id.* at 28a.[4]

b. Judge Leval dissented. He disagreed with the Commission that the "S-Word" and other excretory references could be regulated as indecent, reasoning that "censorship" could be justified only by "potential . . . harm to children resulting from indecent broad-

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[4] The court of appeals also rejected the "Commission's new approach to profanity," finding it to be "supported by even less analysis, reasoned or not." Pet. App. 33a. The Commission does not seek review of that determination. *See* Pet. 11 n.2.

casting," not by a mere "concern for good manners." Pet. App. 59a n.18. "[E]xcrement," which, in Judge Leval's experience, "is a main preoccupation of [children's] early years," could not credibly be said to pose a threat of harm to children. *Id.* "[R]eferences to sex," on the other hand, did pose a sufficiently serious threat to children to warrant "censorship." *Id.* Within that arena, Judge Leval opined that the Commission had provided "a sensible, although not necessarily compelling" rationale for its conclusions that all uses of the "F-Word" are depictions or descriptions of sexual activity and that even a single fleeting use of that word was presumptively patently offensive: "[T]he Commission's central explanation for the change was essentially its perception that the 'F-Word' . . . conveys an inescapably sexual connotation." *Id.* at 49a.

4. The Commission did not ask the court of appeals to rehear the matter en banc.

REASONS FOR DENYING THE PETITION

The Commission acknowledges that, "[o]n its face, the decision of the court of appeals does nothing more than remand the case to the FCC to provide a new explanation for its change in policy," and that such remands generally do "not merit this Court's review." Pet. 26. This case presents no basis for an exception to that general rule. There is no division of authority on the question presented by the Commission. Indeed, no court—not even the Second Circuit—has resolved whether the Commission may regulate fleeting expletives as indecent. The Commission is left to contend that the Second Circuit erred in concluding that the Commission's Remand Order failed to provide a reasoned explanation for its rejection of longstanding agency precedent holding that fleeting utterances of expletives are not indecent

in accordance with the commonly accepted interpretation of the APA. But "the misapplication of a properly stated rule of law" generally does not warrant this Court's review. Sup. Ct. R. 10.

In any event, the Second Circuit's decision is entirely correct. Even having been afforded the opportunity to develop its reasoning on remand, rather than forthrightly explain its radical change in course with respect to the regulation of fleeting expletives, the Remand Order *denied* that there had been any change at all. The Commission cannot reasonably explain a change in policy when it refuses to acknowledge that the policy has changed at all. Indeed, at no point did the Remand Order explain how expletives such as the "F-Word"—words that the Commission had recognized for decades to have numerous non-sexual and non-excretory meanings—could be a depiction or description of sexual or excretory activities each and every time they are uttered. In the absence of such an explanation, the Remand Order's conclusion that Cher's and Nicole Richie's uses of the F-Word were "depictions" of "sexual activity" is arbitrary and capricious.

That administrative law holding creates no tension, much less a conflict, with this Court's decision in *Pacifica*. *Pacifica* narrowly rejected a broadcaster's statutory and First Amendment challenges to the Commission's authority to regulate as indecent a 12-minute monologue, aptly-titled "Filthy Words," that the broadcaster *conceded* to be indecent under the Commission's standard. *Pacifica* had nothing to say about the question at the center of this case—whether, under the APA, the Commission sufficiently and reasonably justified its conclusion that any use of the F-Word or the S-Word constitutes

a "depiction" or "description" of sexual or excretory activities and is presumptively patently offensive.

Not only has the Commission failed to advance a sound rationale for Supreme Court review, it has overlooked a substantial basis for denying review. Under its version of the Question Presented, the Commission's petition for certiorari seeks reinstatement of its authority to regulate fleeting utterances of expletives as indecent. To grant the Commission the relief it seeks, this Court would need to address numerous administrative law, statutory, and constitutional challenges advanced by the broadcasters that the court of appeals did not reach. This Court's policy against review of remands and similar interlocutory orders applies with particular force when a grant of review would compel this Court to address issues without the benefit of a lower court decision, as it would here.

A. The Court Of Appeals Correctly Applied This Court's Administrative Law Precedents

The Commission does not dispute that when an agency undertakes "a reversal of policy," the APA's mandate of reasoned decision making requires it to "adequately explain[] the reasons" for the change. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (when an agency changes policy, it is obligated "to supply a reasoned analysis for the change"). Indeed, "[a]n agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (Roberts, J.). And where, as here, "an agency is applying a multi-factor test through

case-by-case adjudication," "[t]he need for an explanation is particularly acute." *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.).

The Commission also does not dispute that the court of appeals identified and applied the correct legal standard. The Commission simply disagrees with the Second Circuit's conclusion that the Remand Order failed to provide an adequate explanation for the Commission's change in policy with respect to fleeting utterances of expletives. The "reality," the Commission asserts, is that it "provided a thorough, reasoned explanation for its change in policy." Pet. 14. For three reasons, the Commission is incorrect.

1. Of course, it is the explanation provided by the agency—not that of its lawyers (or, for that matter, Judge Leval)—that this Court must evaluate. *See State Farm*, 463 U.S. at 50 ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . . [A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."). So we look to the Remand Order itself for the agency's rationales. And in the Remand Order, far from forthrightly explaining the reasons for its change in policy, the Commission *denied* that it had changed its fleeting expletive policy *at all*. There can be no reasonable explanation for a change in agency policy when the agency refuses to acknowledge even that the policy has changed.

For nearly 30 years, the Commission generally viewed isolated utterances of expletives as falling outside the scope of its definition of indecency—either because the expletive did not depict or describe sexual or excretory activity, or, in the rare cases when the expletive did, in fact, depict or describe such activity, because the isolated and fleeting

nature all but foreclosed a finding of patent offensiveness. In *Golden Globe II* and the Omnibus Order, the Commission abandoned those precedents and held that *any* use of the F-Word and the S-Word is a depiction or description of sexual or excretory activity, and that all such utterances are presumptively patently offensive.

On remand, however, the Commission purported to discover "[a] long line of precedent" supporting the notion that the "F-Word"—even when used only "for emphasis or as an intensifier"—constitutes a depiction or description of sexual activity falling within "the subject matter scope of our indecency definition." Pet. App. 73a ¶ 16; *see also id.* at 83a ("[I]t has long been clear that [expletives] fall within the subject matter scope of our indecency definition, which since *Pacifica* has involved the description of sexual or excretory organs or activities."). The Remand Order similarly dismissed as "staff letters and dicta" the corpus of pre-*Golden Globe* agency precedent establishing that the fact that an expletive was uttered in a passing or fleeting manner and was not repeated weighed forcefully against a finding that the utterance was patently offensive. Pet. App. 79a ¶ 20; *see also* Pet. App. 22a & n.6 (observing that the Remand Order had "backpedal[ed]" from a forthright "recognition that the Commission was departing from prior precedent"). And purporting to discern no change in its policy with respect to fleeting expletives, the Commission rejected the broadcasters' argument that "Nicole Richie's comments would not have been actionably indecent prior to [the Commission's] *Golden Globe* decision." Pet. App. 80a–81a ¶ 22. This is not the grappling with agency precedent that the APA requires to justify a change in policy. It is a stubborn, and absurd, insistence that there had been no change at all.

2. Nor did the Remand Order provide any rationale capable of justifying the Commission's new conclusion that any use of the "F-Word" and the "S-Word" is within the subject matter scope of its indecency definition. Under the first step of the Commission's definition of broadcast indecency, the image or utterance "*must* describe or depict sexual or excretory organs or activities." Pet. App. 71a–72a ¶ 15 (citing *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 8) (emphasis added). The Commission long has acknowledged that some uses of expletives such as the "F-Word" do not carry a sexual meaning and therefore often fall outside the subject matter scope of the Commission's indecency definition. *See, e.g.*, *In re Applications of Lincoln Dellar*, 8 F.C.C.R. at 2585 ¶ 26 (news anchor exclamation that he had "fucked that one up" held to have no sexual meaning). The Remand Order, however, came to an entirely different conclusion, holding that Cher's and Nicole Richie's obviously non-literal uses of the "F-Word" and, indeed, *any* use of the "F-Word," "falls within the scope of [its] indecency definition." Pet. App. 73a–74a ¶ 16.

The Commission offered the following defense of its conclusion: "Given the core meaning of the 'F-Word,' any use of that word has a sexual connotation even if [it] is not used literally." Pet. App. 73a–74a ¶ 16; *see also Golden Globe II*, 19 F.C.C.R. at 4978 ¶ 8 ("any use of [the 'F-Word'] or a variation, in any context, inherently has a sexual connotation"). Even if one assumes (as the Commission apparently does) that a "sexual connation" constitutes a depiction or description of sexual activity, the Commission's reasoning is just an *ipse dixit*: the word is a depiction because it is a depiction. Noticeably absent is *any* explanation for the *change* in the Commission's view as to the *meanings* of the "F-Word." In

this context, the Commission is obligated to explain how the "F-Word" came to develop the "core meaning" the Commission never seemed to discern before. If the Commission believes the meaning and usage of the "F-Word" has narrowed considerably since 2001, it is obligated at least to say so and to justify its conclusion with reasoned argument and evidence. But three times now—first in *Golden Globe II*, then in the Omnibus Order, and finally in the Remand Order—the Commission failed to do so, in the final iteration failing even to acknowledge that there *had* been any change at all. A "barebones incantation of . . . rationales cannot do service as the requisite 'reasoned basis' for altering its long-established policy." *Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987).

The only argument remotely resembling an explanation for the Commission's change in course came to the Commission as an afterthought: "Moreover, in certain cases, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions." Pet. App. 83a ¶ 23. That's it. But far from providing a justification for the Commission's position, this argument illustrates its silliness. The issue is not confusing with respect to the programs in dispute here. For example, no viewer of the 2002 Billboard Awards could reasonably believe that Cher was actually exhorting her audience to have sex with her critics, or that she was otherwise "depicting" or "describing" sexual activity.

If the Commission is not required to justify changes in its views as to the meaning of particular words (which is to say, speech)—if it is permitted to redefine words at its pleasure—there is no effective limit on the subject matter scope of the Commission's

indecency jurisdiction. The court of appeals was right to reject the Commission's transparent efforts to circumvent its own indecency definition and expand its censorship jurisdiction without so much as an attempted, let alone reasonable explanation.

3. The Commission also failed to offer any explanation for its decision to disregard one of the three "principal factors" it previously had identified as pivotal in determining whether material is "patently offensive"—the second step of the Commission's indecency definition. *Industry Guidance*, 16 F.C.C.R. at 8002–03 ¶¶ 8, 10. Quoting this Court's decision in *Pacifica*, the Commission suggests that its policy shift is justified because excusing "'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" Pet. App. 84a ¶ 25. But language that is not indecent threatens no cognizable harm and thus cannot be said to amount to a "blow." The Commission's proffered rationale—that permitting even an isolated expletive forces viewers to absorb the "first blow"—thus takes as an assumption its ultimate conclusion, namely that a fleeting expletive constitutes "indecent language." *Pacifica*, 438 U.S. at 748. A tautology is a grossly inadequate substitute for reasoned explanation.[5]

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[5] In suggesting that broadcasters are urging (and that the decision of the court of appeals requires) "a blanket exemption for isolated expletives," "allowing one free use of any expletive no matter how graphic or gratuitous," Pet. 14, 25, the Commission lampoons both the broadcasters' argument and the decision below. The broadcasters' argument is that, prior to *Golden Globe II*, in cases involving fleeting utterances of expletives, the Commission accorded significant weight to the fact that the material did not "dwell[] on or repeat[] at length" disputed expletives, *see, e.g.*, *Industry Guidance*, 16 F.C.C.R. at 8008 ¶ 17 ("where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has

[Footnote continued on next page]

Even though the Commission's argument that a fleeting expletive constituted a "first blow" to the viewing audience was unsupported by *Pacifica* and contrary to "nearly thirty years" of agency precedent "between *Pacifica* and *Golden Globes*," Pet. App. 25a, the court of appeals nevertheless entertained the notion that it could be sustained if it were appropriately supported by evidence in the administrative record. Such evidence—if any had existed—might have provided some measure of reasoned explanation for the Commission's newly minted view that fleeting expletives were presumptively indecent. But there was no such evidence. Indeed, the Remand Order is "devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation." Pet. App. 32a.[6]

[Footnote continued from previous page]
tended to weigh against a finding of indecency"), and that the Commission's decision to accord *no weight at all* to this "principal factor" was a departure from precedent and change in policy that requires reasoned explanation. And that—not that the Commission must reinstate an "automatic pass" for isolated expletives—is the holding of the court of appeals.

6 Contrary to the Commission's contention (at 22–23), the Second Circuit's observation in this regard is not the least bit inconsistent, much less "in direct conflict," with the D.C. Circuit's decision in *Action for Children's Television v. FCC*, 58 F.3d 654 (1995) (en banc). That case addressed a facial First Amendment challenge to Section 16(a) of the Public Telecommunications Act of 1992, which limited the hours during which indecent material could be broadcast. *See id.* at 656. Section 16(a) applied only to indecent broadcasts; the questions presented were whether and when the First Amendment permits the government to restrict indecent broadcasts. It was in that context that the D.C. Circuit rejected the argument that the Commission was required to demonstrate that indecent speech caused

[Footnote continued on next page]

If the administrative record was "devoid of any evidence" supporting the Commission's supposition that fleeting expletives cause harm to the viewing audience, there was even less support for the Commission's suggestion that continuing the pre-*Golden Globe II* policy would "permit broadcasters to air expletives at all hours of a day so long as they did so one at a time." Pet. App. 85a. As the court of appeals recognized, this contention was contradicted by the Commission's own order, which recognized that even though broadcasters are *permitted* to air indecent material "during the 10:00 p.m.-6:00 a.m. 'safe harbor,'" "they do not allow the 'F-Word' or the 'S-Word' to be broadcast during that time period." Pet. App. 86a–87a ¶ 29. In the absence of any reasoned explanation for the Commission's change in policy, the court of appeals committed no error in remanding the case to the agency for it to provide a complete explanation of its reasoning.

[Footnote continued from previous page]
harm to minors. *Id.* at 661–62. The questions here are antecedent—whether fleeting expletives always fall within the subject matter scope of the Commission's indecency definition and are always presumptively patently offensive—and the court of appeals was quite correct to inquire into the evidence supporting the Commission's affirmative answer. To argue, as the Commission does (at 23–24), that "Section 1464 does not require the Commission to show that the language to which it applies is otherwise harmful" just skips past the question whether Section 1464 sanctions *all* fleeting expletives. The Commission may not, in the guise of ascertaining "'what is in the public interest,'" Pet. 22 (quoting *State Farm*, 463 U.S. at 57), circumvent the First Amendment by arbitrarily enlarging those categories of speech that currently enjoy less-than-full First Amendment protection.

B. There Is No Conflict With This Court's Decision In *Pacifica*

In an attempt to convert a mundane APA-remand case into something more, the Commission contends that the decision below conflicts with *Pacifica*. It does not. *Pacifica*'s First Amendment holding is not even implicated here because the court of appeals did not reach the broadcasters' First Amendment challenge. *See* Pet. App. 35a ("[W]e refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks"). And to the extent *Pacifica* involved a question of statutory interpretation, the question in *Pacifica* is different from the one presented here.

1. In *Pacifica*, this Court addressed a broadcaster's statutory and First Amendment challenges to the Commission's decision to sanction as indecent a broadcast of George Carlin's 12-minute "Filthy Words" monologue. *See* 438 U.S. at 735. That broadcaster *did not dispute* that the Carlin monologue fell within the Commission's definition of broadcast indecency; the monologue contained *100* separate utterances of the "F-Word" or the "S-Word" (an average of one every seven seconds) and the broadcaster acknowledged that several of them "referred to excretory or sexual activities or organs." *Id.* at 739. Nor did the broadcaster "quarrel with the conclusion that this afternoon broadcast was patently offensive." *Id.*

This Court narrowly rejected the broadcaster's First Amendment challenge. "Words that are commonplace in one setting," Justice Stevens explained, "are shocking in another." *Id.* at 747 (plurality op.). Applying the same nuisance rationale it had applied to other sexually indecent speech, the Court held that the First Amendment permitted the Commis-

sion to zone such speech away from daytime broadcasts when children were likely to be in the audience. *See id.* at 746. The Court stressed, however, that it "ha[d] *not* decided that an occasional expletive . . . would justify any sanction." *Id.* at 750 (emphasis added). Indeed, in providing the decisive vote, Justice Powell stated his view, that "certainly the Court's holding today[] does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by [Pacifica] here." *Id.* at 760–61 (Powell, J., concurring).

Unlike *Pacifica*, this case concerns only "isolated use[s] of [] potentially offensive word[s]." *Id.* Unlike *Pacifica*, the broadcasters vigorously dispute that their broadcasts fall within the ambit of the Commission's definition of indecency; they deny that their fleeting broadcasts of the "F-Word" were sexual references; and they most certainly do quarrel with the Commission's conclusion that their broadcasts were patently offensive. And unlike *Pacifica*, this case turns on a routine application of undisputed principles of administrative law, as opposed to a question as sweeping as "whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene." *Id.* at 729. The decision below does not "conflict" with *Pacifica* in any conventional sense of that term.

2. Nevertheless, the Commission maintains that a portion of the reasoning of the decision below is inconsistent with "the context-driven approach governing broadcast indecency that this Court upheld in *Pacifica*." Pet. 15. In scrutinizing the Commission's "first blow" rationale, the Second Circuit observed that the Commission had tolerated expletives when

uttered in an interview of a reality show contestant on *The Early Show* or in *Saving Private Ryan*. *See* Pet. App. 26a–27a. The Commission's willingness to make exceptions—to expose viewers to expletives in some circumstances—the court of appeals reasoned, called into question the Commission's proffered rationale of protecting viewers from the "blows" caused by hearing such language. This line of reasoning, the Commission asserts, "conflicts directly" with *Pacifica*'s "context-driven approach." For at least two reasons, the government is mistaken.

First, *Pacifica* did not announce "the context-driven approach governing broadcast indecency" that the Commission says it did. As noted above, the broadcaster in *Pacifica* did not dispute that the "Filthy Words" monologue was patently offensive. *See* 438 U.S. at 739. "[C]ontext" was relevant in *Pacifica* to determine whether the sanction imposed on repeated, deliberately broadcast, and *concededly indecent* speech violated the First Amendment. *See id.* at 747.

Second, nothing in the decision of the court of appeals prevents the Commission from taking into account the nature of the program that includes a depiction of sexual or excretory activities in determining whether that depiction is patently offensive. The nature of a broadcast is obviously and inescapably relevant to the third "principal factor[]" comprising the test for patent offensiveness—"*whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*." *Industry Guidance*, 16 F.C.C.R. at 8003 ¶ 10. A lengthy and graphic depiction of genitalia is not patently offensive when presented in an educational program on sexual health. But if one holds constant the audience (as the Commission

does), a practice of excluding a depiction of sexual organs in one setting, while permitting the same depiction in other settings, also obviously and inescapably calls into question whether that depiction is uniformly harmful, a proposition on which the Commission's "first blow" rationale for sanctioning fleeting expletives depends. It is the Commission's "first blow" rationale for abandoning the second "principal factor" of its offensiveness test—not its use of context in analyzing the third factor—that the court of appeals called into doubt.

C. The Second Circuit's Remand To The Agency Does Not Warrant This Court's Review

1. The Commission contends that the decision below, which, "[o]n its face . . . does nothing more than remand the case to the FCC to provide a new explanation for its change in policy" with respect to fleeting expletives, in fact, "effectively reinstitutes an automatic per se exemption for the broadcast of isolated expletives," and "strikes at the heart of [the] broadcast indecency regulatory framework." Pet. 26, 27, 28. Indeed, the Commission construes the decision below as "effectively nullif[ying] the prohibition on indecent language found in Section 1464." Pet. 29; *see also id.* at 15 ("The court has . . . effectively invalidat[ed] much of the Commission's authority to enforce 18 U.S.C. 1464."). If the decision below were nearly as momentous as the Commission now suggests—if it truly did "nullif[y]" an Act of Congress and carve out "the heart of [the] broadcast indecency regulatory framework"—one would think that the Commission would have petitioned for rehearing *en banc* before the Second Circuit. But it did not.

Moreover, the Commission's parade of horribles is entirely of its own making: "*If* the Commission[] . . .

cannot . . . provide a reasoned explanation" for its change in policy, "the FCC *may* find itself unable to fulfill a large portion of its broadcast indecency enforcement obligations." Pet. 29 (emphases added). To be sure, the Second Circuit expressed considerable doubt whether the Commission's new policy—even if accompanied by the requisite reasoned explanation for the change in course—could survive the broadcasters' other challenges. Pet. App. 45a. But the Second Circuit's expression of doubt hardly transforms its remand for a reasoned explanation into a "Sisyphean errand." Pet. 15. Proffering a reasoned explanation will not be futile; it will enable the Second Circuit to finally resolve the broadcasters' other administrative law, statutory, and constitutional challenges to the Commission's new policy. That the Commission doubts its own ability to provide a reasoned explanation for its change in course cannot convert this ordinary agency remand—which the Commission agrees generally "would not merit this Court's review," Pet. 26—into a case that compels immediate review.[7]

2. For related reasons, this case is in a uniquely poor posture for Supreme Court review. This Court could not resolve the question presented by the Commission—"[w]hether the court of appeals erred in striking down the . . . Commission's determination

[7] If the Commission's complaint is that the outcome of those other challenges is predetermined, it should be made to bear at least the burden that it places on those who assert a futility exception to the requirement of administrative exhaustion, which is to say, a "showing that an adverse decision [i]s a certainty." *Nat'l Sci. & Tech. Network, Inc. v. FCC*, 397 F.3d 1013, 1014 (D.C. Cir. 2005). The Commission could not possibly make that showing here, where it failed even to seek rehearing from the other judges on the Second Circuit, any of whom might consider future petitions for review.

that the broadcast of vulgar expletives" may be sanctioned as indecent "when the expletives are not repeated," Pet. i—in favor of the Commission without addressing the broadcasters' half-dozen alternative arguments that the court of appeals found no occasion to resolve. *See* Pet. App. 18a (noting the seven arguments raised by broadcasters). Particularly noteworthy among these arguments is the broadcasters' contention that the Commission's definition of indecent material is unconstitutionally indeterminate and vague. The court of appeals did not reach this question, but to determine that the court of appeals "erred in striking down the [Commission's] determination" that the broadcasts at issue could be sanctioned as indecent, Pet. i, this court would need to address it. That fact alone strongly militates against review.

a. As even Judge Leval recognized, to the extent that the Commission is evaluating and sanctioning speech based upon its content, it is engaged in "censorship." Pet. App. 59a n.18. Unless conducted according to clear standards, and with precision and due regard for precedent, government censorship is necessarily arbitrary and inevitably will chill large amounts of speech. It is for that reason that this Court has held that vague and indeterminate content-based restrictions on speech violate the First Amendment. *See, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991).

In *Reno v. ACLU*, 521 U.S. 844 (1997), this Court struck down as unconstitutionally vague an indecency standard in the Communications Decency Act ("CDA") that was materially identical to that employed by the Commission. This Court found the CDA's indecency definition was plagued with "uncertainty" and full of terms that lacked "any textual

embellishment at all" or were barely explained; concluding its vagueness would have had an "obvious chilling effect on free speech," the Court struck down the standard. 521 U.S. at 871 & n.35, 872. As the D.C. Circuit has recognized, "the [*Pacifica*] Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338–39 & n.9 (D.C. Cir. 1988). *Reno*, however, strongly suggests that it is.

The bizarre outcomes produced by the Commission's complaint-driven enforcement regime exemplify the "many ambiguities concerning the scope" of the Commission's indecency standard. *Reno*, 521 U.S. at 870. For example, in its decision concerning *Saving Private Ryan*, the Commission allowed the repeated broadcast of multiple expletives, including "'fuck'" and "'shit' and [their] variations," throughout a three-and-a-half hour movie. The Commission opined that the repeated language was "neither gratuitous nor in any way intended or used to pander, titillate or shock," but instead was "[e]ssential to the ability of the filmmaker to convey" the "horrors of war." *In re Complaints Against Various Television Licensees Regarding Their Broadcast of "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512–13 ¶¶ 13, 14 (Feb. 3, 2005). But notwithstanding its supposed deference to a filmmaker's "ability . . . to convey" an idea, the Commission sanctioned a Martin Scorsese-produced public-television documentary about blues musicians. *See* Omnibus Order, 21 F.C.C.R. at 2686 ¶ 82. There, the Commission quickly rejected the artist's view that the language was "essential," holding that the *Saving Private Ryan* exception would only operate in "unusual circumstances" that were "not present here." *Id.* Broadcasters cannot possibly predict whether individual Commissioners will pro-

tect a program's message as a "matter of public importance," or impose sanctions because its content was "communicative" but not "essential," *id.* at 2689 ¶ 97, nor can they know beforehand whether the Commission will apply its precedent or pronounce it limited to "unusual circumstances." There could be no better example of a "vague" and imperceptible standard.

b. The Commission previously has sought to distinguish *Reno* on the ground that it was an "Internet" case, and because in dicta it "recognized the 'special justifications for regulation of the broadcast media'" mentioned in *Pacifica*. *Indecency Policy Statement*, 16 F.C.C.R. at 8000 ¶ 4.

That distinction fails for two reasons: First, there is no reason why the "medium" should matter in a vagueness inquiry: Either a standard is vague or it is not. *Reno*'s evaluation of the standard applies with equal force here, regardless of the fact that it is an "Internet" case.

Second, to the extent that *Pacifica* premised its distinction of the broadcast medium from other channels of communication on the "'*unique*' attributes of broadcasting," *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989) (emphasis added)—to wit, that broadcasts were, in 1978, "a *uniquely* pervasive presence in the lives of all Americans" and were "*uniquely* accessible to children" as compared to other types of content, *see* 438 U.S. at 748–49 (emphases added)—it rests, thirty years later, on a moth-eaten foundation. In the age of cable and satellite television and the Internet, broadcasting is now one of many methods of delivering content to Americans in their homes. Broadcast television, like other content in our media-driven age, may be "pervasive," but in 2008, even the Commission has trouble con-

tending that it is "*uniquely*" so.[8] And in our current age of media saturation, where children are likely to have access not only to broadcast television, but also to cable or satellite television, the Internet, and a cell phone, it can no longer be seriously maintained that broadcast content is "uniquely accessible to children" when compared to other media. 438 U.S. at 749. Indeed, in light of post-*Pacifica* technologies—such as ratings systems and the V-Chip—that are capable of withholding indecent material "from the young without restricting the expression at its source," 438 U.S. at 748–49, parents have ultimate control over whether programming is "accessible" to children at all. *Cf. United States v. Playboy Entm't Co.*, 529 U.S. 803, 816, 826–27 (2000).

Thus, there no longer exists any sound basis for according broadcast speech less protection than obtains in other channels of communication. As in other media, restrictions on broadcast indecency must employ the least restrictive available means competent to achieve the government's compelling interest. *See Sable Commc'ns*, 492 U.S. at 126; *see also Ashcroft v. ACLU*, 542 U.S. 656, 666–70 (2004) (striking down the Child Online Protection Act because the government had not demonstrated that its compelling interest in protecting minors could not be well-served by parental installation of Internet filtering software); *Playboy*, 529 U.S. at 816, 826–27 (rejecting a statute requiring full scrambling of explicit cable channels when parents could simply ask the cable company to block certain channels from the home). In light of post-*Pacifica* technologies, the

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[8] The Remand Order acknowledges that *86 percent* of television households subscribe to cable or satellite service and receive numerous channels of both broadcast and non-broadcast programming. Pet. App. 106a–107a ¶ 49.

Commission cannot possibly sustain this burden. Indeed, not only are these new technologies less-restrictive alternatives to direct suppression of expression, but, in the case of the V-Chip, it is a *congressionally-mandated* less restrictive means. *See* 47 U.S.C. § 303(x).[9]

This Court could not grant the Commission the relief it requests—affirmance of its new fleeting expletives policy—without first addressing the vagueness and narrow tailoring issues and the others deferred by the court of appeals. The fact that the court of appeals has not yet found occasion to address these issues counsels strongly against immediate review.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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[9] To the extent that the Commission argues that the so-called "scarcity rationale" dictates that this Court apply a more permissive standard of review to its content-based restrictions of broadcasters' speech, this proffered rationale may make it necessary for this Court to reconsider its decision in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), the foundations of which are even more moth-eaten than those of *Pacifica*.

OPPOSITION BRIEF

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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether the court of appeals correctly held as a matter of administrative law that the FCC failed to provide a reasoned basis for reversing its longstanding indecency enforcement policy with respect to isolated and fleeting expletives.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Sup. Ct. R. 29.6, Respondents make the following disclosures:

Fox Television Stations, Inc. states that its parent corporation is News Corporation, and that Liberty Media Corporation owns more than 10 percent of News Corporation stock.

CBS Broadcasting Inc. states that CBS Corporation, a publicly held company, owns an interest of 10 percent or more in CBS Broadcasting Inc.

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly-traded corporation.

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INTRODUCTION

Petitioners seek this Court's review of a decision of the Second Circuit that did nothing more than remand the case to the Federal Communications Commission ("FCC" or "Commission") to provide a fuller explanation for a policy reversal. As petitioners correctly concede, such a case does not typically merit this Court's review. Pet. 15, 26. There is nothing unusual about this case that changes that conclusion. There is no conflict among the courts of appeals on the straightforward administrative law issue decided by the Second Circuit. Nor did the Second Circuit decide any important question of administrative law in a way that conflicts with this Court's precedents. Certiorari should be denied.

Petitioners' principal claim is their erroneous assertion that the Second Circuit's decision regarding the FCC's indecency policy with respect to fleeting and isolated expletives conflicts with this Court's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). In fact, the *Pacifica* court expressly declined to address whether the federal indecency statute, 18 U.S.C. § 1464, would permit a ban on isolated and fleeting expletives; thus, no conflict with *Pacifica* is even possible. Petitioners nonetheless argue that the Second Circuit has prohibited the FCC from taking "context" into account when applying the indecency ban, which petitioners assert is inconsistent with *Pacifica*. But that is a fundamental misreading of the decision below. The Second Circuit merely remanded the case for lack of explanation; it did not substantively hold that the FCC could not consider context. This Court reviews judgments, not statements in opinions, and the remand order in this

case does not present any question warranting this Court's review.

Petitioners' contention that the Second Circuit's decision conflicts with principles of administrative law is equally unfounded. The Second Circuit applied routine administrative law principles in determining that the FCC had failed to provide a reasoned basis for reversing nearly 30 years of precedent with respect to isolated and fleeting expletives. Petitioners in reality are claiming that the Second Circuit misapplied properly stated rules of law—an issue that the FCC did not even ask the court of appeals to rehear and that plainly does not warrant this Court's review. Sup. Ct. R. 10. In addition, contrary to petitioners' suggestion, there is no circuit conflict between the Second Circuit's administrative law decision and a quite different decision of the D.C. Circuit on an issue of constitutional law.

Finally, petitioners argue that the Court should reach out to hear this case now instead of waiting for the FCC to provide a fully articulated explanation and justification for its new indecency enforcement policy. There is no reason for the Court to do so, particularly where, as here, the Second Circuit did not even reach Fox's statutory and constitutional challenges to the FCC's expanded policy. The lower court's remand provides the FCC with an opportunity to address the numerous issues that it evaded in the order under review (in which the FCC tried to argue that it was not changing its policy at all), and to attempt to address the statutory and constitutional issues Fox has raised (which the FCC also evaded). If the FCC attempts such an order and it survives basic scrutiny under the Administrative Procedure Act ("APA"), then Fox's statutory and constitutional challenges would more likely be presented and the

Court could consider whether certiorari is appropriate at that time.

STATEMENT OF THE CASE

1. When the FCC first began to regulate so-called "indecent" speech under § 1464 in the mid-1970's, the agency adopted an extremely cautious and limited enforcement policy. Historically, the FCC viewed this restrained policy as implicitly required by the narrowness of this Court's decision initially upholding the FCC's authority to regulate indecency. *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978). In supplying the fifth vote to uphold that authority, Justice Powell relied in part on the fact that "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 756, 760, 761 n.4 (Powell, J., concurring). Significantly, a central feature of the FCC's cautious approach to indecency enforcement was to refrain from punishing unintentional and isolated expletives, in no small part because the Court emphasized in *Pacifica* that its decision did "not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 750 (1978) (opinion of the Court); *id.* at 760-61 (Powell, J., concurring).

Indeed, the FCC strongly reaffirmed the limited scope of the indecency ban only weeks after *Pacifica*, when the Commission rejected an indecency challenge to a broadcast license renewal. The FCC explained:

> We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling

> that "an occasional expletive . . . would justify any sanction . . . ." . . . Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." . . . He specifically distinguished "the verbal shock treatment [in *Pacifica*]" from "the isolated use of a potentially offensive word in the course of a radio broadcast."

WGBH Educ. Found., 69 F.C.C.2d 1250, ¶ 10 (1978).

For almost 30 years following Pacifica, the FCC did not consider fleeting, isolated or inadvertent expletives to be indecent. In 1987, the FCC adopted what it called a "generic enforcement policy" for broadcast indecency, articulated in three declaratory orders finding that the definition of "indecency" included speech that was the functional equivalent of the "verbal shock treatment" of the George Carlin routine even without using the specific "seven dirty words." See *Pacifica Found., Inc.*, 2 FCC Rcd. 2698, *aff'd sub nom. Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930 (1987), *aff'd in relevant part, rev'd in part sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703 (1987) (same subsequent history); *Infinity Broad. of Pa.*, 2 FCC Rcd. 2705 (1987) (same subsequent history). The FCC's companion orders all involved repeated and intentional broadcasts of material that the Commission deemed to be indecent under its generic standard; none presented the question of whether non-repetitive utterances violated § 1464. The Commission recognized that "analysis of whether particular speech is indecent cannot turn on a mechanistic classification of language," *Infinity Broad. of Pa.*, 2 FCC Rcd. 2705, ¶ 8, and it reaffirmed

that isolated or fleeting utterances would not be considered actionable. *Id.* ¶ 7 ("Speech that is indecent must involve more than the isolated use of an offensive word."); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703, ¶ 3 (same). Thus, the FCC's adoption of the "generic" standard wrought no substantive change in its indecency enforcement policy.

As recently as 2001, the FCC reaffirmed its restrained approach, identifying as a "principal factor" whether the material was dwelt upon or repeated as opposed to fleeting and isolated. *Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, ¶ 10 (2001) ("*Indecency Policy Statement*"). Indeed, to provide a "sense of the weight" given to whether broadcast expletives were fleeting or unintentional, the *Indecency Policy Statement* cited prior decisions that had dismissed indecency complaints solely on that basis. *Id.* ¶¶ 10, 18.

2. The FCC abruptly reversed course in 2004. During a broadcast of the "Golden Globe Awards," the singer Bono declared that his receipt of an award was "really, really fucking brilliant." *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004) ("*Golden Globe Awards Order*"). Under longstanding precedent, this isolated and fleeting expletive would not have been actionably indecent, as the FCC's own Enforcement Bureau recognized in its initial ruling on the broadcast. *"Golden Globe Awards"*, 18 FCC Rcd. 19859, ¶ 5 (Enforcement Bureau 2003). The full Commission, however, reversed the Enforcement Bureau's decision, expressly overruled previous FCC decisions to the contrary, and stressed that "[t]he fact that the use of

[an indecent] word may have been unintentional is irrelevant." *Golden Globe Awards Order*, 19 FCC Rcd. 4975, ¶ 9 (overruling prior holdings that "isolated use of expletives is not indecent" and disavowing prior statements to the contrary, including the original *Pacifica* decision); see also *id.* ¶ 12 n.32 (overruling cases cited in the *Indecency Policy Statement*). In recognition of this sharp break with its longstanding restrained enforcement policy, the FCC declined to issue a civil penalty for the indecency violation at issue in the *Golden Globe Awards Order*. *See id.* ¶ 15 (noting that "existing precedent would have permitted this broadcast").

The FCC's unexpected expansion of the ban on "indecency" created considerable confusion and uncertainty about the scope of the new policy, which was exacerbated by the FCC's inconsistent enforcement decisions. For example, the FCC found that the broadcast of the uncut film *Saving Private Ryan* was not actionable, even though it contained numerous, repeated uses of the words "fuck" and "shit" and their variants. *Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 FCC Rcd. 4507 (2005) ("*Saving Private Ryan Order*"). The FCC offered no explanation for its disparate treatment of various broadcasts, other than vague assertions that it took "context" into account.

3. Recognizing that its dramatic expansion of the indecency regime had created widespread confusion and uncertainty, the FCC issued an Omnibus Order in 2006 to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard" by making findings about

approximately 30 television programs with a "broad range of factual patterns." *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 2664, ¶ 2 (2006) ("*Omnibus Order*"). As relevant here, the FCC concluded that Fox's broadcasts of the 2002 and 2003 "Billboard Music Awards" violated § 1464. On the 2002 broadcast, Cher received an award and spontaneously said that "People have been telling me I'm on the way out every year, right? So fuck 'em." *Id.* ¶ 101. On the 2003 broadcast, presenter Nicole Richie deviated from the script and ad-libbed, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* ¶ 112 & n.164. The FCC found both broadcasts to be actionably indecent, even though the potentially offensive language in both was unscripted and it was undisputed that Fox had no foreknowledge or intention that the words would be broadcast. *Id.* ¶¶ 105, 118. The FCC did not, however, issue notices of apparent liability against these two broadcasts for the express reason that both broadcasts pre-dated the *Golden Globe Awards Order* and were not actionable under prior precedent. *Id.* ¶¶ 111, 124.

Fox and other broadcasters petitioned for review of the *Omnibus Order* in the Second Circuit, arguing *inter alia* that the FCC's dramatic change in its indecency policy lacked an adequate explanation and that the FCC's application of its new policy was arbitrary and capricious. The FCC sought and received a voluntary remand in return for a stay of the Commission's enforcement of its new indecency policy. On remand, the FCC reaffirmed its indecency findings against Fox's broadcasts. Pet. App. 112a-113a. Surprisingly, and despite having consistently acknowledged that the *Golden Globe Awards Order*

represented a sea change in its approach to indecency regulation, the FCC suddenly claimed that it had never changed its indecency policy with respect to isolated and fleeting expletives. Pet. App. 79a. It recast contrary prior precedent as mere "staff letters and dicta," *id.*, and it even implied that the issue of isolated and fleeting expletives had been one of first impression in the *Golden Globe Awards Order*. *Id.* at 80a. The FCC also contended, for the first time, that it could have fined Fox for its broadcasts based on prior FCC decisions. *Id.* at 113a.

4. Following the remand, the Second Circuit granted Fox's petition for review on administrative law grounds. In its brief on appeal, the FCC abandoned its stance that it had not changed the indecency enforcement policy, Pet. App. 22a, and the Second Circuit sought to discern a possible justification for the reversal of course in a *Remand Order* that had refused to acknowledge any such change. The primary justification identified by the court was the FCC's "first blow" theory—the claim that even an isolated and fleeting expletive constituted an immediate "blow" to the broadcast audience that the FCC could prohibit. *Id.* at 25a. The Second Circuit rejected this reasoning for multiple reasons. First, the FCC had provided "no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." *Id.* Second, and more importantly, the first blow theory made sense only if the FCC presumed that mere exposure to potentially offensive language harmed the broadcast audience. The FCC nonetheless permitted some isolated and fleeting (or even repeated) expletives if, for example, they occurred during a "*bona fide* news interview" or

were deemed "integral" to the broadcast. The Commission had not explained how it made those determinations or why such broadcasts constituted lesser "blows" that the broadcast audience should be permitted to suffer, thereby undermining the first blow theory as a justification. *Id.* at 26a-28a.[1]

After concluding that the FCC had failed to articulate a reasoned justification for the change in its indecency policy, the Second Circuit declined to rule on any of the other arguments Fox had raised. In particular, the Second Circuit did not consider Fox's statutory argument that the FCC's indecency findings were invalid because Fox did not have the requisite *scienter* under § 1464. See Pet. App. at 18a. The Second Circuit also did not rule on Fox's First Amendment claims, although it did offer some preliminary thoughts in a section expressly labeled as dicta. *Id.* at 35a-43a & n.12.

Judge Leval dissented. He too recognized that the FCC had, in fact, changed its indecency policy. *Id.* at 47a. In his view, however, the FCC had adequately explained the change with respect to the word "fuck" based on his belief that that word "conveys an inescapably sexual connotation." *Id.* at 49a. Judge Leval did not consider the FCC's policy with respect to the word "shit," although he strongly suggested that he did not consider the term to be indecent. *Id.* at 59a n.18. And even though Judge Leval would

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[1] The Second Circuit also identified other purported justifications to which the *Remand Order* made "passing reference"—including, for example, the supposed difficulty of distinguishing expletives from literal descriptions of sexual or excretory functions and the FCC's fear that broadcasters would air isolated expletives at all hours of the day—but it found all of those ephemeral rationales insufficient as well. Pet. App. 29a-31a.

have rejected Fox's administrative law challenges to the new indecency regime, he curiously declined to address Fox's statutory and constitutional challenges. *Id.* at 60a n.19.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE SECOND CIRCUIT'S DECISION AND *PACIFICA*.

Petitioners' principal argument for certiorari is that the Second Circuit's decision allegedly "conflicts" with *Pacifica*. Pet. 15-19. There is no such conflict, nor could there be. The Second Circuit was considering the FCC's new policy of punishing the broadcast of isolated and fleeting expletives and found that the FCC's explanation of the change in policy was inadequate. This Court, however, has never considered whether the FCC can punish isolated and fleeting expletives under § 1464; indeed, the Court emphasized in *Pacifica* that it was *not* considering that issue. See *Pacifica*, 438 U.S. at 750 (opinion of the Court) ("We have not decided that an occasional expletive . . . would justify any sanction . . . ."); *id.* at 760-61 (Powell, J., concurring) ("The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here.").[2]

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[2] To the extent petitioners are claiming that the "reasoning" of the Second Circuit's administrative law decision conflicts with the reasoning underlying the "approach governing broadcast indecency" upheld in *Pacifica*, Pet. 15, their position is equally unavailing. This Court reviews judgments, not reasoning. *Pacifica*, 438 U.S. at 734 (opinion of the Court); *Black* v. *Cutter*

Petitioners nonetheless try to manufacture a conflict by claiming that the Second Circuit rejected the "context-driven approach governing indecency that this Court upheld in *Pacifica*." Pet. 15. Petitioners' argument assumes that the Second Circuit prohibited the FCC from taking context into account when considering indecency and has "put the FCC to a choice" between a "per se rule of either prohibition or license" with respect to isolated expletives. Pet. 14, 16, 19, 26. This alleged "hostility to a contextual analysis" is said to be "at bottom, an attack on this Court's decision in *Pacifica*." *Id.* at 18.

No fair reading of the Second Circuit's opinion supports this claim. The Second Circuit's decision is simply a garden-variety remand for lack of explanation; it contains no substantive holding with respect to "context." In fact, the Second Circuit made clear that it was *not* faulting the FCC for a failure to adopt an all-or-nothing approach. See Pet. App. 28a n.8; see also *id.* at 45a. Rather, the court concluded only that "the Commission's proffered rationale is disconnected from the actual policy implemented by the Commission." *Id.* at 28a n.8.

As the Second Circuit recognized, the FCC's proffered rationale for its new, expanded policy was the "so-called 'first blow' theory"—the notion that permitting the broadcast of single, isolated expletives would force listeners to accept a "first blow." Pet. App. 25a.[3] The Second Circuit correctly held that

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Labs., 351 U.S. 292, 297 (1956). There is no conflict between *Pacifica* and the Second Circuit's judgment.

[3] The FCC's argument was derived from a passage in *Pacifica* in which the Court was addressing the very different question of the constitutional relevance of the broadcast media's "uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748-49 (opinion of the Court) ("To say that one may

this could not serve as either an explanation or a justification for the new policy, both because the FCC had not explained why after 30 years isolated expletives were suddenly a "first blow" at all (*id.* at 25a), and because the first blow theory "bears no rational connection to the Commission's actual policy concerning fleeting expletives." *Id.* at 26a. The FCC's actual policy on isolated expletives varied considerably, as the Second Circuit recognized. In some cases, such as the Fox broadcasts at issue, the mere inadvertent broadcast of a single word could subject the broadcaster to fines that could reach into the tens of millions of dollars (as well as revocation of its licenses). In other cases, such as the *Saving Private Ryan* case, the FCC deemed even the deliberate broadcast of multiple instances of "fuck" and "shit" and their variants not to be indecent at all. *Compare id.* at 98a, 123a-124a (finding fleeting and isolated uses of such words to be actionably indecent), *with Saving Private Ryan Order*, 20 FCC Rcd. 4507, ¶ 13 (concluding that "numerous expletives and other potentially offensive language" were not actionably indecent). See Pet. App. 25a-28a. The "first blow" theory simply makes no sense as a justification for a policy that often permits many such "blows," and therefore the Second Circuit remanded the case to the agency with the chance to try again to explain its new policy.

That conclusion is unremarkable as a matter of administrative law and merits no further review by

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avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."). In this analogy, the Court was not equating isolated words with "blows"; indeed, its opinion made clear that it was not considering whether the isolated use of potentially offensive words could be deemed "indecent" at all.

this Court. Indeed, the need for an adequate agency explanation for an expanded policy is especially important in this context, because indecent speech is fully protected under the First Amendment. See, *e.g.*, *Sable Commc'ns Inc.* v. *FCC*, 492 U.S. 115, 126 (1989); *Omnibus Order*, 21 FCC Rcd. 2664, ¶¶ 7, 11. In the absence of such an explanation, broadcasters have no guidance as to which broadcasts the FCC will subject to multi-million dollar fines, and in light of the size of the penalties authorized by Congress, broadcasters have no choice but to err on the side of self-censorship.[4]

The Second Circuit has now afforded the FCC an opportunity either to provide a better explanation of its new policy or to modify or retract that new policy. It is hard to imagine a more mundane application of well-settled principles of administrative law. The FCC should be allowed to respond to the court's remand in the first instance; there is no reason for this Court to step in at this early stage of the litigation merely to reconsider that routine administrative law analysis. But in all events, this case does not present the question whether *Pacifica*

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[4] For example, when CBS announced that it would broadcast the Peabody Award-winning *9/11* documentary on the fifth anniversary of the September 11 attacks without editing potentially offensive words, numerous affiliates serving roughly 10% of U.S. households decided they would either not air the program at all, or else delay its start until after the 10 p.m. safe harbor. John Eggerton, *Pappas Won't Air CBS' 9-11 Doc*, Broadcasting & Cable, Sept. 7, 2006 (describing affiliate's decision to preempt the *9/11* documentary, which contains "unedited swearing from the first responders caught in the maelstrom of Ground Zero," because affiliate believed that, "in the current regulatory climate, stations that air network programming with indecent or profane content are subject to significant fines and the threat of license revocation").

permits the FCC to take context into account, nor does the Second Circuit's mere remand for lack of explanation directly raise any issue under *Pacifica*.[5]

II. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH SETTLED PRINCIPLES OF ADMINISTRATIVE LAW AND DOES NOT CONFLICT WITH *ACTION FOR CHILDREN'S TELEVISION*.

Petitioners also assert a hodgepodge of purported inconsistencies with principles of administrative law. Pet. 19-26. None of these claims, however, raises any important issue of administrative law; rather, petitioners simply disagree with how the Second Circuit applied legal principles that are, in fact, well-settled. Accordingly, petitioners ask this Court to expend its limited judicial resources to do nothing more than engage in error correction. Petitioners' request of this Court is particularly curious because they did not even ask the court of appeals to rehear the case. While rehearing is not a jurisdictional requirement, the failure of the government to seek rehearing makes its request for error correction particularly suspect.

1. Petitioners' main "administrative law" argument is that the Second Circuit's "refusal to accept the

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[5] In addition, most of the key passages from *Pacifica* concerning "context" that petitioners believe to be in conflict with the Second Circuit's opinion are from the plurality opinion joined by only three Justices. *See* Pet. 17-18. The two concurring Justices refused to join those passages because they "[did] not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." *Pacifica*, 438 U.S. at 461 (Powell, J., concurring).

Commission's reasoned and reasonable explanation for its change in policy" was "inconsistent with the deferential standard mandated by *State Farm*." Pet. 20-21. That claim is not only patently unworthy of further review (cf. *id.* at 26), it is ironic in light of the FCC's view in the *Remand Order* that its indecency policy had not changed and that no reasoned basis for that change was required. See Pet. App. 22a. Indeed, most of Petitioners' alleged administrative law conflicts are based on relatively minor passages in the Second Circuit's opinion in which the court was charitably attempting to tease out other possible justifications for the FCC's change in policy based on mere "passing reference to other reasons that purportedly support its change in policy." *Id.* at 29a.

As explained above, the Second Circuit in fact considered what little explanation the FCC gave—the "first blow" theory—and rejected it because it had no logical connection to the FCC's actual policy. Pet. App. 25a-26a. That assessment was entirely consistent with settled principles of administrative law and warrants no further review. *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 374 (1998) ("[T]he process by which [an agency] reaches [its decreed] result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which . . . are not supported by the reasons that the agencies adduce.").[6]

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[6] The passages of the *Remand Order* that petitioners quote at 20-21 are drawn from the FCC's attempt to explain why the Fox broadcasts at issue had always been punishable under the pre-*Golden Globe* regime. In fact, isolated expletives could not be punished under the prior policy except in extremely rare, unusually egregious cases. *Compare Indecency Policy Statement*, 16 FCC Rcd. 7999, ¶ 19 (providing examples of such indecent broadcasts), *with Pacifica Found.*, 2 FCC Rcd. 2698,

2. In keeping with its effort to portray its actions as consistent with prior policy, the FCC made no attempt in the *Remand Order* to explain what change in circumstances required abandonment of the restrained indecency policy that had served the public interest for 30 years (and which previous Commissions had believed to be implicitly required by *Pacifica*, see *supra* at 3-4). Not surprisingly, the Second Circuit faulted the FCC for this failure to comply with the most fundamental principles of administrative law. Pet. App. 31a-33a ("the Remand Order provides no reasoned analysis of the 'problem' it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable").

Petitioners, however, try to turn the Second Circuit's ruling into a purported conflict with the D.C. Circuit's opinion in *Action for Children's Television* v. *FCC*, 58 F.3d 654 (1995) (en banc) ("*ACT*"). In *ACT*, the D.C. Circuit reasoned that Congress did not need scientific studies to establish harm to minors from exposure to sexually explicit material, see Pet. 23 (citing *ACT*, 58 F.3d at 662), and petitioners contend that this reasoning "directly conflicts" with the Second Circuit's view that the FCC had not explained why a change in its indecency policy was warranted.

There is no conflict with *ACT* for at least two reasons. First, *ACT* involved a constitutional challenge to a speech regulation, 58 F.3d at 656, 659, and the court found that scientific studies were unnecessary to substantiate a compelling govern-

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¶¶ 3, 17-18 (broadcast of "Shocktime, U.S.A." not indecent). Moreover, before the Second Circuit, the FCC abandoned its position that there had been no change in its policy and conceded that the *Remand Order* was a sharp break from the prior regime. *See* Pet. App. 22a; *accord id.* at 44a (dissent).

mental interest for purposes of strict scrutiny review. *Id.* at 662. That constitutional decision cannot conflict with the Second Circuit's decision on administrative law grounds that the FCC had offered no justification for its change in policy. Second, the D.C. Circuit was considering the FCC's prior policy, in which isolated and fleeting expletives were permitted. The D.C. Circuit made clear that its analysis was assuming the broadcast of hard-core pornography—not isolated words. *Id.* at 660.

3. Petitioners' two remaining administrative law grounds for certiorari are makeweights. First, petitioners criticize the Second Circuit's discussion of the difficulty and significance of distinguishing between expletives and literal descriptions of sexual or excretory functions, Pet. 24, but as the court explained, petitioners' position that such words "always" have a sexual or excretory meaning (even if true) cannot serve as a justification for the FCC's actual policy, because the FCC often permits "even numerous and deliberate" uses of such words to be broadcast. Pet. App. 28a n.9.[7]

Second, petitioners seek review of the Second Circuit's criticism that that the FCC did not adequately consider the fact that "broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes*," Pet. 25 (quoting Pet. App. 30a), but the APA clearly required the FCC to confront that undisputed fact in explaining why a radical expansion in its indecency policy was

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[7] On this point, it makes no difference that one theme of George Carlin's famous monologue was that "many of the expletives he used had non-literal meanings," Pet. 24, because many of the offensive words he employed were, in fact, used in their sexual or excretory senses. *See Pacifica*, 438 U.S. at 751-55.

necessary. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal quotation marks omitted).[8]

III. THE SECOND CIRCUIT'S REMAND TO THE FCC DOES NOT WARRANT THIS COURT'S REVIEW.

Petitioners candidly acknowledge that the Second Circuit's decision remanding this case to the FCC to provide a new explanation for its change in policy ordinarily "would not merit this Court's review." Pet. 26. Petitioners' claim that the Court nonetheless should grant certiorari because of its "immediate and significant effect" is based entirely on petitioners' mischaracterization of the Second Circuit's remand as a substantive holding that the FCC's "regulation of isolated expletives [was] unjustified because it takes account of context, rather than a per se rule of prohibition." Pet. 26-27. As explained above, this is a plain distortion of what the Second Circuit actually held. See *supra* at 11-13. To be sure, the court of appeals identified several issues that a non-arbitrary FCC would have to address in any justification for such a dramatic expansion of its indecency regime, but in that respect the Second Circuit's decision is no different than any other case remanding an arbitrary agency decision for further explanation. Such a

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[8] In any event, both the panel majority and the dissent concluded that the risk of broadcasters airing expletives at all hours of the day was "at most a small part" of the *Remand Order*'s unarticulated rationale for the FCC's change in its indecency policy. *See* Pet. App. 30a n.11 (majority); *id.* at 57a (dissent).

remand hardly constitutes a "Sisyphean errand" (Pet. 15) or something so unu[illegible] that this Court's immediate review is required.

Indeed, granting certiorari prematurely merely to review a remand for further explanation would be particularly ill-advised here because the Second Circuit did not even reach Fox's additional substantive challenges to the FCC's new indecency regime. For example, Fox argued that a broadcaster can violate § 1464 only if it has *scienter*—*i.e.*, if it knowingly broadcasts the words. In the two Fox broadcasts at issue here, Fox did not have the requisite *scienter* because it had no such intention and took reasonable steps consistent with industry practices to prevent broadcasting potentially offensive words. Fox also argued that the FCC's attempt to regulate the isolated use of potentially offensive words was unconstitutional on several grounds. Pet. App. 18a. The Second Circuit did not decide any of these issues. *Id.* at 35a ("we refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks"). Thus, even if this Court were to accept this case and reverse the Second Circuit's administrative law holding, the Court would still have to remand the case to the Second Circuit to permit it to consider Fox's scienter and constitutional arguments. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed . . . ."); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397-98 (1971) (declining to consider a question not passed on by the court of appeals).

The more prudent course is to permit the FCC to respond to the Second Circuit's remand in the first

instance. Indeed, in the *Remand Order* the FCC did not even acknowledge that it was changing its policy, much less address the numerous practical, statutory, and constitutional considerations that would be relevant to such an important expansion of its regulation of protected speech. If the FCC now wishes to readopt some version of its expanded policy, it has the opportunity to confront the issues the Second Circuit has identified, and it can also address the *scienter* and constitutional arguments head-on (both of which it evaded in the *Remand Order*). If the FCC issues such an order and it survives an APA challenge, the important statutory and constitutional challenges to the FCC's expanded regime are more likely to be properly presented and this Court can assess at that time whether certiorari is warranted. There is no need for this Court to insert itself into this case at this juncture just to review the Second Circuit's garden-variety remand.

In the meantime, the sky will not fall if the FCC is required to respond to the Second Circuit's decision. The court's vacatur of the FCC's order merely reinstates the regime that governed for 30 years prior to the *Golden Globe Awards Order*, in which only the sort of "verbal shock treatment" found in *Pacifica* was actionable. Contrary to petitioners' overheated rhetoric (see, *e.g.*, Pet. 27-28), the FCC itself conceded in the *Remand Order* that the networks typically do not broadcast the words at issue here even during the "safe harbor" after 10:00 p.m., when the FCC's rules have long permitted indecent broadcasts. Pet. App. 86a-88a. Nor does the remand create "confusion" for broadcasters or the FCC (see Pet. 30); rather, the return to the pre-*Golden Globe* regime *dispels* the rampant confusion caused by the FCC's abandonment of its restrained enforcement policy. And, the vacatur

significantly reduces the pressure for excessive self-censorship that has reigned since the *Golden Globe Awards Order*.

Finally, petitioners' contention that a circuit conflict is unlikely to develop because all the major television networks can bring future challenges to the indecency regime in the Second Circuit pursuant to 28 U.S.C. § 2343 is incorrect. Pet. 30. In fact, challenges to future indecency enforcement actions could arise in any circuit. The FCC typically issues notices of apparent liability against broadcast licensees—not broadcast networks, as suggested in the petition—for their alleged indecency violations. *See generally Omnibus Order*. Such licensees reside throughout the country, therefore making it possible in different cases for them to bring challenges in other circuits.[9] A future circuit conflict therefore remains possible, and the Court would do well to postpone review until one happens.

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[9] Indeed, a challenge to another FCC indecency order is currently pending in the Third Circuit, *see CBS* v. *FCC*, No. 06-3575 (3d. Cir. argued Sept. 11, 2007) (concerning the Janet Jackson incident at the 2004 Super Bowl), and the broadcast networks can always bring a future case in the D.C. Circuit, as one network initially did in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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REPLY BRIEF

No. 07-582

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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In the Supreme Court of the United States

No. 07-582

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

The decision below invalidates a determination of the Federal Communications Commission (FCC or Commission) that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. 1464, even when the expletives are not repeated. Respondents emphasize that the court of appeals remanded the case to the agency, and they suggest that this Court defer its review until the remand is complete. But the remand would be a pointless exercise. The court of appeals made clear that its decision rests on a hostility to the Commission's contextual approach to indecency determinations, an approach that this Court held to be constitutionally required when it upheld Section 1464 in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). As a re-

sult, there is little the Commission could say on remand—short of abandoning much of the authority that Congress has directed it to exercise—that would not likely result in another vacatur by the court of appeals.

The decision below attempts to coerce the Commission to choose between allowing one free use of any expletive no matter how offensive or gratuitous, or adopting a blanket prohibition on any use of expletives. It has significant consequences because it severely undermines the Commission's ability to enforce Section 1464, even in cases involving repeated expletives. The decision warrants this Court's review.

A. The Decision Below Cannot Be Reconciled With *Pacifica*

Respondents stress the petition's concession (Pet. 15, 26) that, in an ordinary case, a remand to an agency would not warrant this Court's attention. But as the petition also emphasized, this is not an ordinary case. Contrary to respondents' suggestion, the decision below is hardly a "garden-variety" (Fox Br. in Opp. 11) or "routine" (NBC Br. in Opp. 1) remand under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* The court of appeals made clear that it was not simply sending the case back to the Commission for some APA housekeeping. Rather, it believed that the Commission's regulation of indecent broadcasts—regulation undertaken in pursuance of a statutory authority upheld by this Court in *Pacifica* and by the D.C. Circuit in *Action for Children's Television* v. *FCC*, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996) (*ACT*)—suffered from fundamental defects that no amount of explanation could cure. Indeed, the court made no secret of its view that even by "proffering a

reasoned analysis for its new approach to indecency," the FCC would likely be unable to "adequately respond to the constitutional and statutory challenges raised by the Networks." Pet. App. 45a.

That the decision below took the form of a remand to the Commission does not insulate it from this Court's review. The Court often reviews remand judgments when the cases involve legal issues that otherwise merit its attention. See, *e.g.*, *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1*, No. 06-1457 (to be argued Feb. 19, 2008); *NCTA* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005). In this case, the decision of the court of appeals is predicated on a fundamentally erroneous legal analysis, an analysis that warrants review because it is in direct conflict with this Court's decision in *Pacifica*.

According to the court of appeals, the FCC's explanation of its indecency policy was inadequate because the Commission's reasoning "bears no rational connection to the Commission's actual policy regarding fleeting expletives." Pet. App. 26a. Specifically, the court faulted the Commission because it did not "take the position that *any* occurrence of an expletive is indecent." *Ibid.* In other words, the decision below appears to rest on the premise that, in order for the Commission to determine rationally that *some* uses of expletives are offensive and should be deemed indecent, the Commission must find that *all* uses of expletives are indecent. But as explained in the petition (at 26-27), *Pacifica* does not permit, let alone require, such a blanket prohibition. To the contrary, it requires that the Commission look not only at the words themselves but also at the context in which they appear. See *Pacifica*, 438 U.S. at 750; *id.* at 746 (plurality opinion). Indeed, even the court of ap-

peals appeared to be aware of the whipsaw to which its decision subjected the FCC. Pet. App. 26a n.7 ("per se ban" on expletives "would likely raise constitutional questions above and beyond the concerns raised by the current policy").

Respondents contend (Fox Br. in Opp. 13) that the decision below simply requires the FCC "to provide a better explanation of its new policy," but that ignores the reality that the court of appeals' flawed premise appears to doom any effort to prohibit single expletives in some contexts, but not others. In its order, the Commission stated that "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." Pet. App. 83a. The Commission has already explained the significance of context in determining whether the use of an expletive (or multiple expletives) in a broadcast is indecent. See, *e.g.*, *id.* at 127a; *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4513 ¶ 14 (2005). And the Commission has noted the relationship between its contextual analysis and this Court's holding in *Pacifica*. Pet. App. 76a ("[T]he Supreme Court stressed the importance of context in *Pacifica*."). The court of appeals found itself unable to follow the Commission's reasoning only because the court refused to follow *Pacifica*.

According to respondents (Fox Br. in Opp. 10 & n.2), the decision below can be reconciled with *Pacifica* because *Pacifica* did not specifically address the case of isolated expletives, and therefore any conflict with *Pacifica* involves only the court of appeals' "reasoning," not

its "judgment." Respondents are incorrect. The court's judgment vacates the Commission's order, Pet. App. 46a, precisely because the Commission's policy (with respect to both isolated and repeated expletives) makes indecency determinations turn on context and therefore, in the view of the court of appeals, cannot be based on "concern with the public's mere exposure to this language on the airwaves," *id.* at 27a-28a. Under the terms of the remand, if the Commission's next order is not to meet the same fate as its last one, the Commission evidently must either abandon its reliance on context in making indecency determinations or adopt a lowest-common-denominator approach that expressly permits in every context what would be permissible in some contexts. Either option deprives the Commission of the option of considering context. Thus, the judgment of the court of appeals seeks to prevent the Commission from doing what *Pacifica* requires it to do.

Respondents assert (Fox Br. in Opp. 11) that the court of appeals "was *not* faulting the FCC for a failure to adopt an all-or-nothing approach." Instead, they say, the court simply concluded that "the Commission's proferred rationale is disconnected from the actual policy implemented by the Commission." *Ibid.* (quoting Pet. App. 28a n.8). But the "disconnect[]" identified by the court was nothing more than the Commission's failure to "take the position that *any* occurrence of an expletive is indecent." Pet. App. 26a. The court's analysis is incompatible with the contextual inquiry that *Pacifica* commands.

B. The Decision Below Disregards Settled Principles Of Administrative Law And Conflicts With A Decision Of The D.C. Circuit

Although the court of appeals gave several additional reasons for its rejection of the Commission's explanation of its new policy, those reasons are inconsistent with settled principles of administrative law and conflict with the D.C. Circuit's decision in *ACT*. Respondents' efforts to defend the court's holding are unavailing.

1. Respondents contend (Fox Br. in Opp. 15) that the Commission said in its order that "its indecency policy had not changed and that no reasoned basis for that change was required." The claim is puzzling, because the Commission forthrightly acknowledged that it had changed its prior policy of giving a free pass to the use of expletives that are not repeated. See Pet. App. 82a (describing previous decisions stating "that expletives had to be repeated to be indecent" as "seriously flawed," and "reaffirm[ing] that it was appropriate to disavow" them). And the Commission acknowledged its change in policy not only in its words but also in its actions. It did not sanction Fox for either broadcast at issue here, and, in the case of the 2002 Billboard Music Awards, the *only* reason for its forbearance was its recognition that "it was not clear at the time that broadcasters could be punished for the kind of comment at issue here." *Id.* at 122a; see *id.* at 124a & n.206.

2. Respondents repeat the court of appeals' error in characterizing the Commission's order as resting primarily or exclusively on a "'first blow' theory." Fox Br. in Opp. 15; see NBC Br. in Opp. 20; Pet. App. 25a. In fact, the Commission's "most important[]" reason for changing its policy was that "categorically requiring repeated use of expletives in order to find material inde-

cent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." *Id.* at 83a. As the Commission explained, its former approach was anomalous because it made one factor—whether material was repeated—dispositive in a subset of indecency cases. *Ibid.* Judge Leval recognized this to be the Commission's rationale for its change of policy and observed that the new policy "made the Commission more consistent rather than less, because under the new rule, the same context-based factors will apply to all circumstances." *Id.* at 54a. NBC is therefore incorrect when it asserts (Br. in Opp. 21 n.5) that the Commission now gives "*no weight at all*" to whether a word is repeated. In fact, the Commission considers that factor, along with all other relevant factors, in determining whether a broadcast is indecent. Pet. App. 82a-83a. But certainly nothing in that contextual approach demands that the Commission permit one free expletive or ignore the potential consequences of a single expletive.

3. According to the court of appeals, the Commission was required to present "evidence that suggests a fleeting expletive is harmful" and that "this harm is serious enough to warrant government regulation." Pet. App. 32a; see NBC Br. in Opp. 21. As explained in the petition (at 22-24), that holding conflicts not only with *Pacifica* but also with the D.C. Circuit's decision in *ACT*, which affirmed the Commission's authority to regulate broadcast indecency, and which emphasized that "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material." 58 F.3d at 662.

Respondents attempt to distinguish *ACT* on the grounds that it involved a constitutional challenge and that it arose under the FCC's old policy. Fox Br. in Opp. 16-17. Neither of those distinctions is relevant here. As *ACT* makes clear, Congress has found that indecent material is harmful to children, and that finding is entitled to deference. The Commission's responsibility is to enforce the statute that Congress enacted, not to second-guess the evidentiary basis for the findings that led Congress to act.

C. This Court's Review Is Warranted

1. As explained in the petition (at 27-29), the decision below warrants review not only because it conflicts with *Pacifica* and *ACT*, but also because it will have a significant effect on the FCC's enforcement of 18 U.S.C. 1464, an effect that extends well beyond the regulation of isolated expletives. Respondents assert that the court of appeals' rejection of the FCC's contextual approach was limited to the agency's proscription of expletives that are not repeated. That is incorrect. The court looked to the Commission's finding that the use of expletives in a broadcast of "Saving Private Ryan" did not make the broadcast indecent, and it inferred that the Commission must not be "concern[ed] with the public's mere exposure to this language on the airwaves." Pet. App. 27a-28a; see Fox Br. in Opp. 12. But the expletives in "Saving Private Ryan" were repeated. Accordingly, if the non-indecency finding with respect to the repeated expletives in "Saving Private Ryan" makes the Commission's indecency finding with respect to the Billboard Music Awards broadcasts irrational, it would equally make the indecency finding with respect to the Carlin monologue irrational. Indeed, Judge Leval in dissent

correctly noted that the majority's criticism of the Commission's contextual approach was in no way limited to non-repeated material. Pet. App. 53a-54a.

Respondents embrace the court of appeals' suggestion that "non-literal" uses of expletives may not be deemed indecent. See Fox Br. in Opp. 17 n.7; NBC Br. in Opp. 18-20. They do not dispute that under the court's decision, the FCC apparently will have no power to regulate even the repeated broadcast of expletives as long as none of the expletives is used in a "literal" sense. Under that logic, the Commission would be unable to find large portions of the Carlin monologue indecent, since Carlin principally used the expletives in a "non-literal" sense. See *Pacifica*, 438 U.S. at 754 (Carlin noting that the F-Word "leads a double life," literal and non-literal). Nor, conversely, is it clear that all the uses involved here were not literal. See Pet. App. 73a. And, in all events, the extent to which single uses are literal, non-literal, vulgar, or explicit is best considered as part of a contextual inquiry.

Thus, respondents err in suggesting (Fox Br. in Opp. 20) that the case does not warrant review because the "vacatur of the FCC's order merely reinstates the regime that governed for 30 years prior to the *Golden Globes Awards Order*, in which only the sort of 'verbal shock treatment' found in *Pacifica* was actionable." The court of appeals rejected the Commission's contextual approach to evaluating expletives—the very approach that the Commission used in finding indecent the "verbal shock treatment" of *Pacifica*. Its decision therefore does not "reinstate[]" the pre-*Golden Globes* regime; it substantially hobbles effective enforcement of an Act of Congress.

2. Fox contends (Br. in Opp. 19) that certiorari is unwarranted because deciding the question presented in favor of petitioners would still leave some issues, such as those raised by respondents' constitutional claims, to be decided by the court of appeals on remand. NBC goes further (Br. in Opp. 27-28), arguing that the Court "could not resolve the question presented" without first addressing the constitutional claims. But of course this Court is not required to address constitutional questions when the case before it can be resolved on other grounds. In fact, its practice is just the opposite. Cf. *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The Court often grants certiorari to decide one question presented by a case and then remands to the court of appeals for further proceedings, which may include the resolution of issues not addressed by this Court. See, *e.g.*, *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002). Petitioners seek a ruling only on the APA issues addressed by the court below; this Court could then remand to allow the court of appeals to consider the remaining issues in the case.

Fox also asserts (Br. in Opp. 20) that the best course would be for the Commission to accept the court of appeals' remand so that it can address Fox's constitutional arguments, which it supposedly "evaded" in its order. How the Commission "evaded" those arguments is mysterious, since it devoted 11 paragraphs of its order to them. See Pet. App. 103a-104a (vagueness challenge); *id.* at 105a-112a (claim that *Pacifica* is no longer good law); see also *id.* at 114a-115a (claim that finding of indecency requires scienter). Respondents' constitutional claims—which, in any event, are foreclosed by *Pacifica*—have already been addressed by the Commission and provide no basis for denying review.

3. Finally, respondents contend (Fox Br. in Opp. 21) that a circuit conflict "remains possible," and they urge the Court to "postpone review until" one emerges. But even though the networks *could* "bring a future case in the D.C. Circuit" (*id.* at 21 n.9), there is no reason for them to do so as long as the decision below remains the law of the Second Circuit. Indeed, it is hard to understand how the networks' lawyers could explain such a course to their clients. Tellingly, respondents do not deny that they could avoid a circuit conflict by bringing all future challenges to indecency findings with respect to network programming in the Second Circuit. While it is true that FCC forfeiture orders are issued against individual licensees, each network owns and operates a number of its own licensees and therefore can choose the Second Circuit as a venue by filing first in that court and then transferring later-filed petitions there. See 28 U.S.C. 2112(a)(1) and (5). Even if the United States filed forfeiture enforcement actions against individual licensees in district courts outside the Second Circuit, see 47 U.S.C. 504(a), a network could simply pay the forfeitures under protest in order to moot those actions and allow it to file a petition for review in the Second Circuit, see *AT&T* v. *FCC*, 323 F.3d 1081 (D.C. Cir. 2003).

As noted in the petition, the decision below puts the Commission in a wholly untenable position. Congress has charged the Commission with eliminating indecency on the airwaves during daytime and evening hours, and *Pacifica* holds that there is no constitutional obstacle to executing that congressional charge. The decision below effectively prevents the Commission from carrying out its charge, and yet it is the Commission that will be held

accountable for the coarsening of the airwaves. This Court's review at this juncture is clearly warranted.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

FEBRUARY 2008

JOINT APPENDIX

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No. 07-582

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
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FOX TELEVISION STATIONS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED: MAR. 17, 2008

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-1760-ag

FOX TELEVISION STATIONS, INC., CBS BROADCASTING INC., WLS TELEVISION, INC., KTRK TELEVISIONS, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC INC., PETITIONERS

v.

FEDERAL COMMUNICATION COMMISSION, UNITED STATES OF AMERICA, RESPONDENTS

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., DOING BUSINESS AS CENTER FOR CREATIVE VOICES IN MEDIA, INC., ABC TELEVISION AFFILIATES ASSOCIATION, INTERVENORS

DOCKET ENTRIES

DATE	PROCEEDINGS
4/13/06	Case Docketed: Petition for review of agency order on behalf of PETITIONER CBS Broadcasting Inc., Fox Television Stations, Inc., filed. [Entry date Apr 17 2006] [BM]

* * * * *

DATE	PROCEEDINGS
4/14/06	Movant NBC Telemundo License Co., Movant NBC Television Affiliates', Movant NBC Universal, Inc. motion for leave to intervene/ become party filed with proof of service. [Entry date Apr 17 2006] [BM]
4/14/06	Movant FBC Television Affiliates Association, Movant CBS Television Network Affiliates motion for leave to intervene/become party filed with proof of service. [Entry date Apr 17 2006] [BM]
	* * * * *
5/1/06	Before: Hon. Dennis Jacobs, Circuit Judge Order FILED GRANTING motion intervene/ become party by Movant NBC Universal, Inc., Movant NBC Telemundo License Co., Movant NBC Television Affiliates', endorsed on motion dated 4/14/06. (AMH) [Entry date May 1 2006] [BM]
5/1/06	Order FILED GRANTING motion intervene/become party by Movant FBC Television Affiliates Association, Movant CBS Television Network Affiliates, endorsed on motion dated 4/14/2006. (AMH) [Entry date May 1 2006] [BM]
	* * * * *

DATE	PROCEEDINGS
5/12/06	Movant Center for the Creative Community, Inc. motion for leave to intervene/become party filed with proof of service. [Entry date May 15 2006] [BM]
	* * * * *
5/23/06	Certified list of items comprising the record on appeal filed. [Entry date Jun 1 2006] [BM]
5/23/06	Before: Hon. Rosemary S. Pooler, Circuit Judge, Order FILED GRANTING motion intervene/become party by Intervenor Center for the Creative Community, Inc., endorsed on motion dated 5/12/2006. (TWY) [Entry date May 23 2006] [BM]
	* * * * *
7/6/06	Respondent United States of America, Respondent Federal Communications Commission motion for voluntary remand and stay of briefing schedule filed with proof of service. [Entry date Jul 12 2006] [BM]
7/6/06	Intervenor ABC Television Affiliates Association, Petitioner KMBC Hearst-Argyle Television, Inc., response in support of the motion for voluntary remand and stay of briefing schedule filed with proof of service. [Entry date Jul 12 2006] [BM]

DATE	PROCEEDINGS

* * * * *

7/6/06 Intervenor CBS Television Network Affiliates, Intervenor NBC Television Affiliates', response in support of the respondents' motion for remand filed with proof of service. [Entry date Jul 11 2006] [BM]

7/6/06 Intervenor FBC Television Affiliates Association, Petitioner CBS Broadcasting Inc., Petitioner Fox Television Stations, Inc., in opposition to Interventors' motion for extension of time filed with proof of service. [Entry date Jul 11 2006] [BM]

7/6/06 Petitioner KTRK Television, Inc., Petitioner ABC Inc., response in support of the respondents' motion for voluntary remand filed with proof of service. [Entry date Jul 11 2006] [BM]

7/7/06 Intervenor NBC Telemundo License Co., Interventor NBC Universal, Inc., in opposition to motion for voluntary remand and stay of briefing schedule filed with proof of service. [Entry date Jul 11 2006] [BM]

7/7/06 Petitioner CBS Broadcasting Inc., response in opposition to motion for voluntary remand and stay of briefing schedule filed with proof of service. [Entry date Jul 11 2006] [BM]

* * * * *

DATE	PROCEEDINGS
7/10/06	Petitioner Fox Television Stations, Inc., motion for stay during remand period filed with proof of service. [Entry date Jul 11 2006] [BM]
	* * * * *
7/11/06	Respondent United States of America, Respondent Federal Communications Commission reply for voluntary remand and stay briefing schedule filed with proof of service. [Entry date Jul 13 2006] [BM]
	* * * * *
7/12/06	Petitioner CBS Broadcasting Inc., amended opposition to joint motion for voluntary remand and stay of briefing schedule filed with proof of service. [Entry date Jul 13 2006] [BM]
7/14/06	Intervenor FBC Television Affiliates Association, Petitioner Fox Television Stations, Inc., reply in support of alternative motion for stay during remand period filed with proof of service. [Entry date Jul 19 2006] [BM]
	* * * * *

DATE	PROCEEDINGS
7/28/06	Motion for remand, stay and to strike opposition is on the substantive motions calendar for August 29, 2006**TO BE ARGUED**; and responsive papers to calendar ASAP. [Entry date Jul 28 2006] [JC]
8/7/06	Petitioner Fox Television Stations, Inc., et al leave to file supplemental memorandum in support of Oppositions to Joint motion for Voluntary Remand filed with proof of service. [Entry date Aug 9 2006] [BM]
8/11/06	Intervenor Center for the Creative Community, Inc. motion for leave to file opposition filed with proof of service. [Entry date Aug 11 2006] [BM]
	* * * * *
8/21/06	Respondent United States of America, Respondent Federal Communications Commission, response to joint motion to file supplemental memorandum filed with proof of service. [Entry date Aug 22 2006] [BM]
8/23/06	Petitioner Fox Television Stations, Inc., motion for leave file supplemental reply memorandum filed with proof of service. [Entry date Aug 24 2006] [BM]
	* * * * *

DATE	PROCEEDINGS
8/24/06	Order FILED GRANTING motion file supplemental appendix by Petitioner Fox Television Stations, Inc., Petitioner CBS Broadcasting Inc., Intervenor FBC Television Affiliates Association, Intervenor CBS Television Network Affiliates, endorsed on motion dated 8/23/2006 [Entry date Aug 25 2006] [SC]
	* * * * *
9/7/06	Present: Hon. Ralph K. Winter, Hon. Jose A. Cabranes, Hon. Rosemary S. Pooler, Circuit Judges. Upon due consideration, it is ORDERED that the motion of Fox and CCV to file supplemental memorandum are GRANTED, and respondents' motion to strike the opposition of CBS is DENIED as moot inasmuch as the challenged opposition papers have been withdrawn. It is further ORDERED that the respondents' motion to REMAND the cause to the FCC for a period of sixty (60) days from the date of the entry of this order is GRANTED for the entry of a further final or appealable order of the FCC following such further consideration as the FCC may deem appropriate in the circumstances. By stipulation of the parties, including the FCC, at oral argument on August 29, 2006, enforcement of Section III.B of the Omnibus Order, which

DATE	PROCEEDINGS

applies the standards announced in the Golden Globe Order, is hereby STAYED pending further order of this Court, and the instant appeal shall be AUTOMATICALLY REINSTATED as of the sixth-first day following the date of the entry of this order. THE APPEAL THEREAFTER SHALL BE EXPEDITED as follows: petitioners shall file petitions for review and briefs in support thereof no later than fourteen (14) days after the date of reinstatement of this appeal; respondent FCC shall file its brief in response to any such petitions for review no later than fourteen (14) days following the filing of the petitions for review pursuant to the terms of this order; and petitioners shall file reply briefs no later than seven (7) days after the date of the filing of respondent FCC's responsive brief, as of which dated the cause shall be deemed SUBMITTED for argument and decision. The Clerk of the Court is hereby directed to include the instant petition in the first calendar proposed after the petition's reinstatement. By: Lucille Carr. [Entry date Sep 7 2006] [BM]

* * * * *

DATE	PROCEEDINGS
11/8/06	Notice of reinstatement pursuant to Order dated 9/7/2006. [Entry date Nov 8 2006] [BM]
	* * * * *
11/21/06	Letter dated 11/21/2006 received from Petitioners' Attorney, Seth P. Waxman, requesting that this petition be held in abeyance. [Entry date Nov 21 2006] [BM]
11/21/06	Letter dated 11/21/2006 received from David Kusher, Counsel to KMBC Hearst-Argyle Television, Inc., requesting that this petition be held in abeyance. [Entry date Nov 22 2006] [BM]
11/22/06	INTERVENOR FBC Television Affiliates Association, PETITIONER Fox Television Stations, Inc., brief filed with proof of service. [Entry date Nov 22 2006] [BM]
11/22/06	INTERVENTOR FBC Television Affiliates Association; PETITIONER Fox Television Stations, Inc., special appendix filed (w/pdfs) [Entry date Nov 22 2006] [BM]
11/22/06	INTERVENOR FBC Television Affiliates Association; PETITIONER Fox Television Stations, Inc., joint appendix, volume 1, filed, w/pdfs. [Entry date Nov 22 2006] [BM]

DATE	PROCEEDINGS
11/22/06	INTERVENOR FBC Television Affiliates Association; PETITIONER Fox Television Stations, Inc., joint appendix, volume 2, filed, w/pdfs. [Entry date Nov 22 2006] [BM]
	* * * * *
11/22/06	PETITIONER CBS Broadcasting Inc., brief filed with proof of service. [Entry date Nov 22 2006] [BM]
	* * * * *
11/22/06	Order FILED GRANTING motion consolidate appeals by Petitioner Fox Television Stations, Inc., endorsed on motion dated 11/21/2006. (SC) [Entry date Nov 28 2006] [BM]
	* * * * *
11/27/06	Order filed stating: IT IS HEREBY ORDERED: That petition for review of 06-2750-ag only is held in abeyance based on letter submitted to the Court dated 11/21/06. Endorsed by: Shane Clouden. [Entry date Nov 27 2006] [SC]
	* * * * *

DATE	PROCEEDINGS
11/27/06	INTERVENOR Center for the Creative Community, Inc., brief filed with proof of service. [Entry date Nov 28 2006] [BM]
	* * * * *
11/27/06	INTERVENOR NBC Telemundo License Co., NBC Universal, Inc., brief filed with proof of service. [Entry date Nov 28 2006] [BM]
	* * * * *
11/28/06	Letter dated 11/21/2006 received from Intervenors CBS and NBC Affiliates' Attorney, Robert A. Long, Jr., advising the Court that they will not file a brief in this appeal. [Entry date Nov 28 2006] [BM]
	* * * * *
11/29/06	AMICUS CURIAE Glen Robinson, brief filed with proof of service. [Entry date Nov 30 2006] [BM]
	* * * * *
11/30/06	AMICUS CURIAE American Booksellers Foundation for Free Expression, American Civil Liberties Union, American Federation of Television and Radio Artists, Brennan Center for Justice, ET AL, brief filed with proof of service. [Entry date Dec 4 2006] [BM]

DATE	PROCEEDINGS

* * * * *

11/30/06 AMICUS CURIAE Center for Democracy and Technology, Adam Thierer, brief filed with proof of service. [Entry date Dec 5 2006] [BM]

* * * * *

12/7/06 RESPONDENT Federal Communications Commission, United States of America, brief filed with proof of service. [Entry date Dec 8 2006] [BM]

* * * * *

12/13/06 AMICUS CURIAE Morality in Media, Inc., brief filed with proof of service. [Entry date Dec 14 2006] [BM]

* * * * *

12/14/06 PETITIONER Fox Television Stations, Inc., reply brief filed with proof of service. [Entry date Dec 14 2006] [BM]

12/14/06 INTERVENOR NBC Telemundo License Co., NBC Universal, Inc., reply brief filed with proof of service. [Entry date Dec 15 2006] [AB]

* * * * *

DATE	PROCEEDINGS
12/14/06	AMICUS CURIAE Thomas North, brief filed with proof of service. [Entry date Dec 14 2006] [BM]
	* * * * *
12/15/06	PETITIONER CBS Broadcasting Inc., reply brief filed with proof of service. [Entry date Dec 15 2006] [AB]
	* * * * *
12/20/06	Case heard before POOLER, LEVAL, HALL, C.JJ CD DATE: 12/20/06 [Entry day Dec 29 2006] [RD]
	* * * * *
6/4/07	Petition for review is GRANTED, the order of the FCC is VACATED and the case is REMANDED to the agency by published signed opinion filed. (RSP). Judge Leval dissents in a separate opinion. [Entry date Jun 4 2007] [DB]
	* * * * *
6/4/07	Judgment filed. [Entry date June 4 2007] [DB]
	* * * * *
7/27/07	Judgment MANDATE ISSUED. CLOSED [Entry date Jul 27 2007] [DB]

DATE	PROCEEDINGS
	* * * * *
3/24/08	Writ of Certiorari GRANTED [Entry date Apr 3 2008] [BM]
3/24/08	Notice of Reinstatement dated 3/24/2008, Writ of Certiorari GRANTED, FILED. Reinstatement Code: M. [Entry date Apr 7 0208] [BM]
4/7/08	Letter sent to the FCC recalling mandate. [Entry date Apr 7 2008] [BM]

Problem ID: 10

Date: 12/11/2003
From: Robert Fench
Subject: BILLBOARD AWARDS ON FOX

I WAS SITTING HERE IN ,Y LIVING ROOM WITH MY KIDS AND I AM RECORDING THIS TO SPEAK TO AN ATTORNEY AND PARIS HILTON AND HER FRIEND WERE UP GIVING THE AWARD AND SHE SAID FUCKING ON NATIONAL TV MY SON ASKED ME MOMMY WHAT IS FUCKING? THANKS ALOT FOR LETTING A VULGAR WORD GET PLAYED ON NATIONAL TV AND FOR TEACHING MY CHILD THIS THANKS A WHOLE LOT I WOULD WATCH THE TAPE IF I WERE YOU THIS HAPPENED A FEW MINUTES AFTRE 8PM CENTRAL TIME.

Problem ID: 15

Date: 12/11/2003
From: Rico Blanco
Subject: Fu## on TV

I must tell you that again, you let our country down with the airing of the f### word on national television. I want you to know that my 5 and 8 year old sons were watching the Billboard Music Awards when the F### word aired on our TV. Please tell me know what the FCC plans to do to insure this never happens again! Please remember we pay the taxes that make up your big paycheck!! Please get off you butt and do the work we pay you to do!!! Thanks for your time. Ricardo

Problem ID: 29

Date: 12/11/2003
From: Mcgregor, Karen
Subject: BILLBOARD AWARDS AIRED ON FOX 12-10-03

Dear Mr. Powell, I am wanting to let you that as I sat with my 13 year old daughter last night and watched the Billboard Awards, I was not happy to hear Nicole Richey say the F word after she was told to be careful what she said. There is absolutely NO reason for words of that nature to be spoken especially during primetime. I live in Central Texas and we are on central time, so the showed aired from 7pm to 9pm. Even Ryan Secrest made the comment that we are live! I am tolerant of a lot of things shown and said on TV, but the F word is not necessary in any context! My child, along with other children, hear and see enough at school, on TV and in general life as it is. I realize that channels can be changed, but who knew we were going to hear such vulgar words? In 2 separate parts of Pink's performance, the TV blanked out. I am assuming that it was something that wasn't politically correct to see, then why was Nicole's mouth not bleeped out? I feel that this was planned all along. I did not see Bono's acceptance from the Golden Globes but heard that he used the F word as a descriptive one. While I'm guessing his was just the way he talks, Nicole's was deliberate. People wonder what has happened to our society, to our children and why life is like it is. I am not blaming the media for all that goes on, but we all know how impressionable our children can be and if they do not have responsible adults to take care of them, they hear and see from the media

and take it to heart and think that it is all ok. I appreciate your time and attention to this matter and if you are a parent, grandparent or neither, that you understand how important it is that we take a stand on issues like this to try to protect our children for as long as we can. I look forward to your response. Thank you, Karen L. McGregor Cater Elementary Secretary 791-6419.

Problem ID: 2016

Date: 12/12/2003
From: Colleen Collins-Reyes
Subject: FOX TV

Colleen Collins-Reyes [**REDACTED**] December 12, 2003 Dear Chairman Powell: My son and I were watching the 2003 Billboard Music Awards the other night, and I cant say that I have ever been so disappointed in you guys, Why would you allow such a thing? Don't you guys have grand kids that you would like to not see running around the house swearing at you? You guys allowed some trashy talk and swearing on there. When my son asked me what f**king meant I vowed to never watch FOX again. I don't know where you guys are coming from on this issue but something has to be done. I truly feel that the FCC has the responsibility of enforcing what constitutes decency on our nation's airways. Why have they failed the American people in this responsibility? To whom is the FCC accountable? I hope you plan on atlease considering changing this law. It is unappropriate and a disapointment to the American people. As if our kids haven't started becoming unruly enough. Has it dawned on anyone that 30 years ago when we had movies and TV kids could watch that we had no shootings in school, teenagers weren't acting like disrespectful punts etc. Oh or do you have the ignorant attitude that this has nothing to do twith it? Well let me shed some light, KIDS ONLY KNOW WHAT THEY LEARN. Stop teaching our kids it is ok to be rude and disrespectful. i would hope that you plan on looking into this matter and let me know about your findings. Sincerely, Colleen Collins

Problem ID: 8537

Date: 12/15/2003
From: Anna Holmes
Subject: new regulations

Dear Chairman, Recently, my children, who are 6 and 9, we scanning the channels looking for a TV program to watch. We stopped at the Billboard Music Awards. We were not on the channel for 5 minutes when one of the musicians said the word "Fucking". I was shocked and disgusted. I am also disgusted by the ruling that using this or similar language is ok. It is hard enough to teach your children manners and decent behavior without showing young adults on the TV using it. I hope you will reverse your ruling immediately. It is sad that anyone would say this is ok. Sincerely, Anna Holmes [**REDACTED**]

Problem ID: 22775

Date: 12/16/2003
From: Kathleen Abernathy; Michael Copps; KJMWEB; Commissioner Adelstein ANNETTE ALVAREZ
Subject: Obscenity in Billboard Awards

Dear Chairman Powell: Please, please, please take a stand against the barrage of obscenities we're confronted with each and every day over our radio waves and television signals. As a mother of 3 boys: 15, 13 & 9, I'm exhausted by the policing I have to do to keep them from hearing vulgar language intended to shock and tittillate. It doesn't matter the time of day. We've been accosted by vulgarities at 7 a.m. as well as 4:00 p.m., never mind the evening television hours. I resent that my children and I can't listen to the radio or watch tv together as I'm never sure what will or won't be said. I subscribe to the theory that parents are the first line of defense. In our family, we don't buy our children violent video games, we discuss music before it's purchased and we certainly don't allow carte-blanche viewing of movies without looking into why they're rated PG-13 or PG. It's still not enough. As much as I believe in personal responsibility, I also believe that society should function for the common good of its citizens. Please, tell me, what benefits do we derive from profanity being so ingrained in our culture? This is a vast, diverse, wonderful country that we are fortunate to claim as our own. We've had an illustrious past and should look forward to a future filled with wonder and awe, but instead, I'm left shaking my heard that our civil society has found itself in a virtual cesspool

of vulgarity. Commissioner, you're in a position to make a difference. Please take a hard look at what's happening and impose swift, strict penalties in each and every case for any violations of standards. It's the right thing to do. Sincerely, Annette Green [REDACTED].

Problem ID: 22787

Date: 12/16/2003
From: Carol Haglund
Subject: Profanity on TV

Dear Sir or Madame: I write this letter to voice my objection over the profanity on TV, particularly the use of the F word on the Billboard Music Awards by Ms. Richie. I have two young daughters, ages 12 and 14 and find it appalling that the use of the this kind of language is used on TV at all, let alone at 9:00 p.m. on a show that they would be interested in. Its bad enough that every subject relating to sex is available to them at any time of the day or night on TV. Where is it going to stop?? We have to stand up for what is right, not for what sells. Our children's moral future is at stake. Please do what you can to help the family's of this country try to do what is right. Carol Haglund [**REDACTED**]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 06-17

IN THE MATTER OF
COMPLAINTS REGARDING VARIOUS TELEVISION
BROADCASTS BETWEEN FEBRUARY 2, 2002 AND
MARCH 8, 2005

Adopted: Feb. 21, 2006
Released: Mar. 15, 2006

NOTICES OF APPARENT LIABILITY AND MEMORANDUM OPINION AND ORDER

By the Commission: Chairman Martin, Commissioners Copps and Tate issuing separate statements; Commissioner Adelstein concurring, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. The Commission has regulated the broadcast of indecent programming for decades, and our authority in this area has long been upheld as constitutional by the U.S. Supreme Court. During the last few years, however, we have witnessed increasing public unease with the nature of broadcast material. In particular, Americans have become more concerned about the content of television programming, with the number of complaints annually received by the Commission rising from fewer than 50 in 2000 to approximately 1.4 million in 2004. At the same time, broadcasters have sought guidance from

the Commission about our rules, arguing that they lack certainty regarding the meaning of our indecency and profanity standards. The decisions we issue today respond to both of these concerns.

2. In these decisions, we address hundreds of thousands of complaints alleging that various broadcast television programs aired between February 2002 and March 2005 are indecent, profane, and/or obscene. The cases we resolve today represent a broad range of factual patterns. Taken both individually and as a whole, we believe that they will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard. The cases also further refine our standard regarding the use of profane language in the broadcast medium and illustrate the types of language proscribed by that standard. Overall, the decisions demonstrate repeatedly that we must always look to the context in which words or images occur to determine whether they are indecent. In addition, while we find certain highly offensive language to be presumptively profane, we also take care to emphasize that such words may not be profane in specified contexts.

3. Section II below is devoted to providing a full description of the Commission's standards for analyzing whether programming is indecent and/or profane and referencing the legal sources upon which these standards are based. In Section II, we also fully describe our methodology for calculating proposed forfeitures against broadcast licensees when there has been an apparent violation of our prohibitions against indecency and/or profanity.

4. In Section III, we apply these indecency and/or profanity standards to the complaints before us on a case-by-case basis. We begin with cases in which we have determined that the broadcast licensee apparently aired indecent and/or profane material and propose forfeitures against the licensee. The monetary forfeitures proposed demonstrate that the Commission will exercise its statutory authority to ensure that the broadcast of indecent and/or profane material will be appropriately sanctioned.

5. Section III next addresses cases in which we find the complained-of material indecent and/or profane but do not propose taking action against the licensee. In these cases, the licensee was not on notice at the time of the broadcast that we would deem the relevant material indecent or profane. For example, we hold that a single use of the word "shit" and its variants (the "S-Word") in the contexts presented is both indecent and profane. However, we do not propose adverse action in these cases because we have not previously announced this conclusion.

6. Section III concludes with a discussion of a number of cases in which we determine that various words, phrases, or scenes that occur in a variety of programs, while undoubtedly upsetting to some viewers, do not warrant action against the broadcast station licensee. We reach these determinations either because the complained-of material is not within the scope of our indecency or profanity definitions or because, even if it is within the scope of our indecency definition, it is not, in the contexts before us, patently offensive as measured by contemporary community standards for the broadcast medium.

7. Together, these decisions demonstrate the Commission's strong commitment to fulfilling the responsibility vested in us by Congress within the parameters of the United States Constitution. We believe that issuing these decisions as a single order will enable broadcasters to better understand the boundaries of our indecency and profanity standards, while at the same time responding to the concerns expressed by hundreds of thousands of citizens in complaints filed with the Commission. In the end, our primary objective is to fulfill our statutory obligation to enforce the law in this area and to do so in a clear and consistent manner.

II. BACKGROUND

8. Section 1464 of title 18, United States Code, prohibits the broadcast of obscene, indecent, or profane programming.[1] The FCC rules implementing that statute, a subsequent statute establishing a "safe harbor" during certain hours, and the Communications Act of 1934, as amended (the "Act"), prohibit radio and television stations from broadcasting obscene material at any time and indecent material between 6 a.m. and 10 p.m.[2]

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[1] 18 U.S.C. § 1464.

[2] *See* 47 C.F.R. § 73.3999; *see also* Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992) (setting the safe harbor of 10 p.m. to 6 a.m. for the broadcast of indecent material); *see also Action for Children's Television v. FCC*, 58 F. 3d 654 (D.C. Cir. 1995) (*en banc*) ("*ACT III*"), *cert. denied*, 516 U.S. 1072 (1996) (affirming restric-

Broadcasters also may not air profane material during this time period.[3]

9. The federal prohibition against the broadcast of indecent and profane material is longstanding. In the Radio Act of 1927, Congress first provided that "[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."[4] This prohibition was then reenacted as part of the Act and was moved subsequently to title 18 of the United States Code in 1948.

10. ***Indecency Analysis.*** The federal courts have consistently upheld Congress's authority to regulate the broadcast of indecent material, as well as the Commission's interpretation and implementation of the governing statute. In 1978, the U.S. Supreme Court, in upholding the constitutionality of the prohibition against the broadcast of indecent material, concluded that "special treatment of indecent broadcasting" was appropriate. The Court noted that the Commission's authority to regulate indecent broadcast material is justified by two pri-

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tions prohibiting the broadcast of indecent material between the hours of 6 a.m. and 10 p.m.)

[3] *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order 18 FCC Rcd 19859 (Enf. Bur. 2004), *review granted*, 19 FCC Rcd 4975, 4981 ¶¶ 13 and 14 (2004) (*"Golden Globe Awards Order"*), *petitions for stay and recon. pending*. The Commission established a "safe harbor" period from 10 p.m. to 6 a.m. during which profane speech may be legally broadcast as a narrowly tailored means of vindicating its compelling interests in assisting parents and protecting minors, consistent with the D.C. Circuit's decision that the same "safe harbor" period for indecent material is consistent with the Constitution. *See ACT III*, 58 F.3d at 667.

[4] 44 Stat. 1172.

mary considerations, both of which are equally, if not more, applicable today. First, the broadcast media occupy "a uniquely pervasive presence in the lives of all Americans."[5] Indecent material "presented over the airwaves confronts the citizen, not only in public, but also in the privacy of their own home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[6] "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[7] Indeed, while the Supreme Court's observation regarding the pervasiveness of the broadcast media dates back to 1978, the ubiquity of television in the lives of Americans has only increased in the intervening 28 years. Second, the Supreme Court observed that "broadcasting is uniquely accessible to children, even those too young to read."[8] This finding is even more relevant today given the increased accessibility of the broadcast media to children.[9]

11. Enforcement of the provisions restricting the broadcast of indecent, obscene, or profane material is an important component of the Commission's overall responsibility over broadcast radio and television operations. At the same time, however, the Commission must

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[5] *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("*Pacifica*").

[6] *Id.*

[7] *Id.*

[8] *Id.* at 749.

[9] *See* Donald F. Roberts, Ulla G. Foehr, and Victoria Rideout, *Generation M: Media in the Lives of 8-18 Year Olds* (March 2005) at 12-13 (finding that 99% of children 8-18 have a television set in their home and that 68% of children 8-18 have a television set in their bedroom).

be mindful of the First Amendment to the United States Constitution and section 326 of the Act, which prohibit the Commission from censoring program material or interfering with broadcasters' free speech rights.[10] As such, in making indecency determinations, the Commission proceeds cautiously and with appropriate restraint.[11]

12. The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.[12]

> Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently*

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[10] U.S. CONST., amend. I; 47 U.S.C. § 326. *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

[11] *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1344, 1340 n. 14 (1988) ("*ACT I*") (stating that "[b]roadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear," and that any "potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

[12] *See Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. Pacifica*, 438 U.S. 726).

offensive as measured by contemporary community standards for the broadcast medium.[13]

13. In our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important."[14] Three prin-

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[13] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999, 8002 ¶¶ 7-8 (2001) ("*Indecency Policy Statement*") (emphasis in original). In applying the "community standards for the broadcast medium" criterion, the Commission has stated:

> The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.

WPBN/WTOM License Subsidiary, Inc., Memorandum Opinion and Order, 15 FCC Rcd 1838, 1841 ¶ 10 (2000) ("*WPBN/WTOM MO&O*"). The Commission's interpretation of the term "contemporary community standards" flows from its analysis of the definition of that term set forth in the Supreme Court's decision in *Hamling v. United States*, 418 U.S. 87 (1974), *reh'g denied*, 419 U.S. 885 (1974). In *Infinity Broadcasting Corporation of Pennsylvania (WYSP(FM))*, Memorandum Opinion and Order, 3 FCC Rcd 930 (1987) (subsequent history omitted), the Commission observed that in *Hamling*, which involved obscenity, "the Court explained that the purpose of 'contemporary community standards' was to ensure that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Id.* at 933 (citing 418 U.S. at 107). The Commission also relied on the fact that the Court in *Hamling* indicated that decisionmakers need not use any precise geographic area in evaluating material. *Id.* at 933 (citing 418 U.S. at 104-05). Consistent with *Hamling*, the Commission concluded that its evaluation of allegedly indecent material is "not one based on a local standard, but one based on a broader standard for broadcasting generally." *Id.* at 933.

[14] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

cipal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience.[15] In examining these three factors, we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly, other factors."[16] In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[17] or, alternatively, removing the broadcast material from the realm of indecency.

14. In each of the cases below in which the complaint alleges indecency, we apply the two-pronged indecency analysis described above. Specifically, we first determine whether the complained-of material is within the scope of our indecency definition; *i.e.*, whether it describes or depicts sexual or excretory activities or organs. If so, we then turn to the three principal factors of the second prong to determine whether, taken in context, the material is patently offensive as measured by

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[15] *Id.* at 8002-15 ¶¶ 8-23.

[16] *Id.* at 8003 ¶ 10.

[17] *Id.* at 8009 ¶ 19 (*citing Tempe Radio, Inc (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid), and *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (finding that the extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references).

contemporary community standards for the broadcast medium.

15. As evidenced below, our contextual analysis takes into account the manner and purpose of broadcast material.[18] For example, material that panders to, titillates, or shocks the audience is treated quite differently than material that is primarily used to educate or inform the audience. In particular, we recognize the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee.[19]

16. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, we concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it involved vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[20] We indicated in that decision that we would analyze other potentially profane words on a case-by-case basis.

17. Just as with indecent broadcasting, we are mindful that, in exercising our statutory authority over

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[18] *Indecency Policy Statement*, 16 FCC Rcd at 8010 ¶ 20 (noting that "the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding").

[19] *See Syracuse Peace Council*, Memorandum Opinion and Order, 2 FCC Rcd 5043, 5050-51 ¶ 52 (1987) (subsequent history omitted) (eliminating the fairness doctrine, which placed an affirmative obligation on broadcasters to cover, and present contrasting viewpoints on, controversial issues of public importance).

[20] 19 FCC Rcd at 4981 ¶ 13.

profane broadcast material, we must proceed with "due respect for the high value our Constitution places on freedom and choice in what the people say and hear."[21] In the *Golden Globe Awards Order*, we interpreted profanity, citing a decision by the U.S. Court of Appeals for the Seventh Circuit, as "denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[22] In the context of broadcasting, however, it is not clear whether the "fighting words" portion of this definition applies. Given the nature of television and radio, it appears unlikely that broadcast material would provoke immediate violence between those uttering such words and the audience. Therefore, in the cases below, and as a general matter, we will analyze potentially profane language with respect to whether it is "so grossly offensive as to constitute a nuisance."

18. Additionally, given the sensitive First Amendment implications in this area, we establish a presumption that our regulation of profane language will be limited to the universe of words that are sexual or excretory in nature or are derived from such terms. As our regulation of profane language is based on a nuisance rationale similar to that which forms the basis for indecency regulation, we believe that the same limitation on the scope of our regulation is appropriate and rests upon

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[21] *ACT I*, 852 F.2d at 1344 (noting that "the potentially chilling effect of the FCC's generic definition will be tempered by the Commission's restrained enforcement policy.").

[22] 19 FCC Rcd at 1980 ¶ 12.

sound constitutional footing.[23] Although we recognize that additional words, such as language conveying racial or religious epithets, are considered offensive by most Americans, we intend to avoid extending the bounds of profanity to reach such language given constitutional considerations.[24]

19. We conclude below that certain vulgar sexual or excretory terms are so grossly offensive to members of the public that they amount to a nuisance and are presumptively profane. We reserve that distinction for the most offensive words in the English language, the broadcast of which are likely to shock the viewer and disturb the peace and quiet of the home. We also note, however, that in rare cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[25] As detailed below, we caution that we will find this exception to be applicable only in unusual circumstances.

20. ***Forfeiture Calculations***. The *Notices of Apparent Liability for Forfeiture* ("*NALs*") contained in this decision are issued pursuant to section 503(b)(1) of the

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[23] *See Pacifica*, 438 U.S. at 748-751; *Golden Globe Awards Order*, 19 FCC Rcd at 4981-82 ¶¶ 13-16.

[24] *See, e.g., Raycom America, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 4186, 4187, ¶¶ 3-4 (2003); *Complaint of Julian Bond, Atlanta NAACP*, Letter, 69 FCC 2d 943 (Broadcast Bur. 1978).

[25] *See Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005) ("*Saving Private Ryan*").

Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission or to have violated section 1464 of title 18, United States Code, shall be liable to the United States for a forfeiture penalty.[26] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.[27] The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act,[28] and the Commission has so interpreted the term in the section 503(b) context.[29] The term "repeated" means that the action was committed or omitted more than once, or lasts more than one day.[30] We emphasize that every licensee is responsible for the decision to air particular programming and will be held accountable for violating federal restrictions on the willful or repeated broadcast of obscene, indecent, or profane material.

21. The Commission's *Forfeiture Policy Statement* establishes a base forfeiture amount of $7,000 for the transmission of indecent or obscene materials.[31] The

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[26] 47 U.S.C. § 503(b)(1)(B) & D. *See also* 47 C.F.R. 1.80(a)(1).

[27] 47 U.S.C. § 312(f)(1).

[28] *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

[29] *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

[30] *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1359, 1362 ¶ 9 (2001).

[31] *See Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113 (1997), *recon. denied*, 15

Forfeiture Policy Statement also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[32] For the cases in this decision, the statutory maximum forfeiture amount for each apparent violation occurring prior to September 7, 2004 was $27,500.[33] The statutory maximum forfeiture amount for violations discussed in this decision occurring on or after September 7, 2004 is $32,500.[34] Consistent with the *Forfeiture Policy Statement*, we calculate forfeiture amounts by: (1) determining whether to use the base statutory amount, the maximum statutory amount, or a different figure below the statutory maximum based upon consideration of the factors enumerated in section 503(b)(2)(D); and (2) multiplying that figure by the number of violations. Where repeated violations have occurred but the resulting total forfeiture amount would be excessive to achieve the appropriate level of punishment and deterrence, we also may adjust the total proposed forfeiture according to the stated statutory factors.

FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); *see also* 47 C.F.R. § 1.80(b).

[32] *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01 ¶ 27.

[33] Effective September 7, 2004, the Commission amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. *See Amendment of Section 1.80 of the Commission's Rules*, Order, 19 FCC Rcd 10945, 10946 ¶ 6 (2004).

[34] *Id.*

III. DISCUSSION

A. Notices of Apparent Liability for Forfeiture

1. "The Surreal Life 2" (February 8, 2004)[35]

22. ***The Programming.*** The Commission received a complaint alleging that WBDC Broadcasting, Inc. ("WBDC Broadcasting"), licensee of Station WBDC-TV, Washington, D.C.,[36] and other station affiliates of the WB Television Network (the "WB Network"), broadcast indecent material during the *Pool Party Episode* of the program "The Surreal Life 2" on February 8, 2004, at 9:00 p.m. Eastern Standard Time. On September 27, 2004, the Bureau sent a letter of inquiry to the WB Network concerning this and other episodes of "The Surreal Life 2."[37] In response to the letter of inquiry, the WB Network stated, *inter alia*, that Station WBDC-TV aired the complained-of episode on February 8, 2004 at 9:00 p.m. Eastern Standard Time.[38]

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[35] FCC File No. EB-04-IH-0166.

[36] *See* Letter from Lara Mahaney, Parents Television Council, to David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 17, 2004). In its complaint, PTC incorrectly states that the call sign of the station is "KBDC-TV," but it appears that the complained-of station is Station WBDC-TV based on our review of the videotape of the program provided by PTC.

[37] *See* Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to John Maatta, Executive Vice-President and General Counsel, The WB Television Network (September 27, 2004).

[38] *See* Letter from Arthur H. Harding, Esquire, Fleischman and Walsh, L.L.P., counsel for The WB Television Network, to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (October 6, 2004) ("October Response"); Letter from Arthur H. Harding, Esquire, Fleischmann and Walsh, L.L.P., counsel for the WB Television Net-

23. "The Surreal Life 2" is a "reality-based" television program in which six cast members from diverse backgrounds share a luxurious house for 12 days. One of the six cast members, Ron Jeremy, is a veteran actor in pornographic movies. In the *Pool Party Episode*, he gives a pool party for about twenty of his friends in the pornographic movie industry. During the ten-minute sequence depicting this party, the episode displays approximately 20 pixilated views of various female guests' nude breasts and, in one case, a female guest's entire nude body. In addition, there are numerous other examples of sexual images and innuendo, including two brief, pixilated scenes in which Mr. Jeremy touches or kisses a female guest's bare breast; a scene in which Andy Dick, another guest at the party, places his mouth on the top portion of a female cast member's breast and makes a comic sound, and the female cast member explains that they are just friends; another scene in which Andy Dick kisses a female guest's pixilated bare breast and spanks her buttocks, stating jestingly that she should go to her room and he'll join her there shortly; a scene where a female guest appears to sexually proposition a male cast member;[39] and a scene in which another female cast member suggests that the party attendees play a game

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work, to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (November 1, 2004).

[39] In this scene, program participant Erik Estrada says that one of the female guests propositioned him with "an oral compliment." The camera then turns to a scene where the female guest in question says to Mr. Estrada: "Wanna come inside [bleep]." Mr. Estrada responds with a shocked facial expression. The camera then turns to a scene in which he says into the camera: "And I said 'ah you're very kind and generous, but you know what? I'm a married man.'"

of "strip truth or dare to get naked," saying to Ron Jeremy, "[c]ome on porn star, everyone knows about your big [bleep], though I haven't seen it."

24. ***Indecency Analysis.*** We find that the material meets the first prong of the indecency test. As noted above, the episode contains several pixilated views of nude breasts and a nude body, as well as other sexual images and innuendo described above.[40] All of this material depicts or describes sexual activities and organs.

25. Moving to the second prong of our indecency test, we also find that the material is, in the context presented here, patently offensive as measured by contemporary community standards for the broadcast medium. The first of the three principal factors in our contextual analysis weighs in favor of a finding of patent offensiveness because the material is explicit and graphic. In this regard, the mere pixilation of sexual organs is not necessarily determinative under our analysis because the material must be assessed in its full context.[41] Here, despite the obscured nature of the nudity, it is unmistakable that partygoers are exposing and discussing sexual organs as well as participating in sexual activities, such as when Mr. Jeremy touches or kisses an unclothed female breast. Indeed, a child watching this program could easily discern that nude or partially nude adults are attending a party and participating in, or soliciting

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[40] *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20194 ¶ 10 (2004) ("*Married By America NAL*") (program featuring bachelor and bachelorette parties with pixilated nudity of professional strippers met first prong of indecency standard).

[41] *Id.*

participation in, sexual activities.[42] We, therefore, find that the complained-of material is explicit and graphic.

26. With respect to the second prong of our contextual analysis, we find that the broadcast dwells on and repeats the sexual material. We have repeatedly held that repetition and persistent focus on sexual or excretory material is a relevant factor in evaluating the potential offensiveness of broadcasts.[43] In this case, the presentation of approximately 20 views of pixilated female nudity within a ten-minute segment, together with other depictions or descriptions of sexual organs or activities during the same episode, demonstrates that this episode dwells upon and repeats sexual material.

27. Looking to the final prong of our test, we conclude that the broadcast material is presented in a manner that panders to, titillates, and shocks the audience. Among other things, the material depicts male cast members and party guests ogling, fondling, and kissing female party guests' bare breasts, a male party guest spanking a female guest's buttocks and placing his lips on a female cast member's breast, a female party guest sexually propositioning a male cast member, and a male and female cast member attempting to goad one another into disrobing, with the female cast member proposing a game of "strip truth or dare to get naked." The strong

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[42] *Id.* (finding that "although the nudity was pixilated, even a child would have known that the strippers were topless and that sexual activity was being shown.").

[43] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); *see also Married by America NAL*, 19 FCC Rcd at 20195 ¶ 11;; *Entercom Seattle License, LLC*, Order on Review, 19 FCC Rcd 9069, 9073-74 ¶ 13 (2004) (*"Entercom Seattle Order on Review"*), *petition for recon. pending.*

emphasis on the fact that some female party guests are pornographic film stars also panders to the audience.

28. In reaching our determination, we disagree with WB Network's contention that "these isolated scenes contain no graphic depictions or profanity that might rise to the level of actionable indecency."[44] In support of its argument, WB Network cites the *KSAZ MO&O* and the *Buffy the Vampire Slayer MO&O* in which we denied indecency complaints. Both of these cases, however, are distinguishable from the *Pool Party Episode* of the "The Surreal Life 2." Each of those cases involved two fully clothed adults, and the individual scenes involved were less graphic, explicit, and sustained than the complained-of material here.

29. In sum, because the material is explicit and graphic, is dwelled upon, and presented in a manner to titillate and shock viewers, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[45] Therefore, there is a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

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[44] October Response at 2 (citing *KSAZ Licenses, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 15999 (2004) ("*KSAZ MO&O*") and *Complaints Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program "Buffy the Vampire Slayer" On November 20, 2001*, Memorandum Opinion and Order, 19 FCC Rcd 15995 (2004) ("*Buffy the Vampire Slayer MO&O*")).

[45] *See* 47 C.F.R. § 73.3999.

30. ***Forfeiture Calculation.*** In the instant case, WBDC Broadcasting consciously and deliberately broadcast this episode. Accordingly, we find that WBDC Broadcasting's broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.

31. Based on the egregious nature of the broadcast material at issue, and the factors enumerated in section 503(b)(2)(D) of the Act, we further find that a forfeiture amount of $27,500, the statutory maximum in effect at the time of the broadcasts, is appropriate.[46] The gravity of the apparent violation is heightened by the degree to which the scene dwells on and repeats sexual material in a manner that titillates and shocks viewers. The scene lasts for over ten minutes, contains approximately twenty pixilated images of nude adults, including a fully nude body, and focuses almost entirely on men and women disrobing, ogling, fondling, kissing, and sexually propositioning one another during a pool party. Moreover, the *Pool Party Episode* of "The Surreal Life 2" is a taped program with an obvious sexual theme that could have been ascertained and preempted by the licensee or shown after 10 p.m.

32. Although other stations also may have broadcast the *Pool Party Episode*, we propose a forfeiture only against WBDC Broadcasting, Inc. as the only licensee whose broadcast of the material was actually the subject

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[46] The subject broadcast occurred prior to the September 7, 2004, effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is $27,500. *See supra* ¶ 21.

of a viewer complaint to the Commission.[47] We recognize that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming.[48] Our commitment to an appropriately restrained enforcement policy, however, justifies this more limited approach towards the imposition of forfeiture penalties.[49] Accordingly, we propose a forfeiture of $27,500 against WBDC Broadcasting, Inc.

2. "Con El Corazón En La Mano" (October 9, 2004)[50]

33. ***The Programming.*** The Commission received a complaint alleging that NBC Telemundo License Co. ("NBC Telemundo"), licensee of Station KWHY-TV, Los

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[47] The fact that WBDC may not have originated the programming in question is irrelevant to whether there is an indecency violation. *See Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, Notice of Proposed Rulemaking, 10 FCC Rcd 11951,11961, ¶ 20 (1995) (internal quotation omitted) ("We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.").

[48] *See Married By America NAL*, 19 FCC Rcd at 20196 ¶ 16 (proposing forfeitures against all Fox Television Network affiliate stations that broadcast apparently indecent material). *See also Clear Channel Broadcasting Licenses, Inc. et al.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 6773, 6779 ¶ 16 (2004) (proposing forfeiture against all commonly owned and operated stations that broadcast the programming at issue, and directing an investigation into stations owned by another licensee that broadcast the same program), *vacated per consent decree*, 19 FCC Rcd 10880 (2004).

[49] *See supra* ¶ 11 and note 11.

[50] FCC File No. EB-04-IH-0572.

Angeles, California, aired indecent material at approximately 8:15 p.m. on October 9, 2004, during a broadcast of the Spanish-language movie, "Con El Corazon En La Mano." The complaint alleged that the broadcast contains a scene depicting a man and woman engaged in sexual intercourse while another individual watches them.

34. On April 8, 2005, the Bureau directed a letter of inquiry to NBC Telemundo concerning the broadcast.[51] NBC Telemundo responded by letters dated May 19 and June 24, 2005.[52] As confirmed by a videotape of the program provided by NBC Telemundo, the scene in question depicts a man raping a woman in a public restroom while another man stands nearby, acting as a lookout. NBC Telemundo acknowledges that it aired the movie over Station KWHY-TV, Los Angeles, California, beginning at 8:00 p.m. on October 9, 2004, and that the scene took place within the first 15 minutes of the broadcast.[53] NBC Telemundo maintains, however, that "the complained-of material is not actionably indecent because it does not include depictions of nude sexual or excretory

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[51] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to NBC Telemundo License Co. (April 8, 2005).

[52] *See* Letter from F. William LeBeau, Senior Regulatory Counsel and Assistant Secretary, NBC Telemundo License Co., to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau (May 19, 2005) ("Response"); Letter from F. William LeBeau, Senior Regulatory Counsel and Assistant Secretary, NBC Telemundo License Co., to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau (June 24, 2005).

[53] Response at 2-3.

organs, offensive language or other material that the Commission previously has deemed indecent."[54]

35. ***Indecency Analysis.*** We find that the programming at issue is within the scope of our indecency definition because it clearly depicts sexual activity. NBC Telemundo does not deny that the material portrays a woman being raped.

36. We also find that the complained-of material is, in the context presented, patently offensive as measured by contemporary community standards for the broadcast medium. Turning to the three principal factors that inform our contextual analysis, the scene is explicit and graphic. The material depicts a woman being savagely attacked and raped in a public restroom. One man grabs the woman and forcibly kisses her as she struggles to free herself. He strikes her to the floor and, kneeling down, grabs one of her breasts as she screams. As they struggle together on the floor, the camera focuses on their hips, showing his hand pulling her underwear down her bare thigh as he maneuvers on top of her with his groin between her legs. She forces him off her by grabbing his testicles, but the other man blocks her escape from the room, and the first man again pulls her to the floor, re-mounts her and begins kissing her. She appears to cease resisting and returns his kisses. The camera again pans to their hips, showing his hand fumbling at his zipper. They quite clearly appear to have sexual intercourse, with his groin thrusting into hers as she moans, until he finally stops and rolls off of her. The scene then continues for several minutes, depicting her reaction to the attack. The material by its very design

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[54] *Id.* at 2.

is extraordinarily intense and extremely graphic. We reject NBC Telemundo's claim that the material is neither explicit nor graphic simply because it contained no actual nudity. For example, in the *Married By America NAL*, we found that scenes in which nudity is electronically obscured may be considered graphic and explicit if the sexual nature of the scene is unmistakable.[55] In this case, the sexual nature of the scene is unquestionable, and the material is undeniably graphic, notwithstanding the lack of nudity.

37. Moving to the second factor in our contextual analysis, we conclude that the broadcast dwells on sexual material. We have repeatedly held that a persistent focus on sexual material is a relevant factor in evaluating the potential offensiveness of broadcasts.[56] The rape scene in question lasts several minutes and, contrary to NBC Telemundo's claim, is hardly ephemeral. As we stated in the *Indecency Policy Statement*, "[r]epetition and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts."[57]

38. With respect to the third factor, we find the material to be shocking. In this regard, NBC Telemundo

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[55] 19 FCC Rcd at 20194 ¶ 10. *See also Back Bay Broadcasting*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 3997, 3998 (Mass Media Bur. 1999) ("*Back Bay NAL*") (forfeiture paid) (finding broadcast indecent despite attempt to obscure objectionable language because words remained clearly "recognizable, notwithstanding the editing").

[56] *See Indecency Policy Statement*, 16 FCC Rcd at 8008, ¶ 17 (citing cases); *see also "Married By America" NAL*, 19 FCC Rcd at 20195 ¶ 11; *Entercom Seattle Order on Review*, 19 FCC Rcd at 9073-74 ¶ 13.

[57] 16 FCC Rcd at 8008 ¶ 17.

concedes that the rape scene was designed to portray the "intensity of [a] serious and unspeakable event. . . ."[58] We agree. Not only does the scene portray an "unspeakable" event of a profoundly disturbing sexual and violent nature, it depicts an incident that was unquestionably shocking and one to which children should not have been exposed. We reject NBC Telemundo's argument that the instant case is indistinguishable from *Saving Private Ryan*,[59] wherein we determined that graphic language throughout the movie was critical to portraying serious events realistically.[60] NBC Telemundo has not demonstrated here that the depiction of a woman being violently raped in such a sustained and graphic manner is essential. In any event, even if these aspects of the scene were essential to the movie, that finding would not alter our ultimate conclusion in this case because the other two factors weigh heavily in favor of a finding of patent offensiveness as measured by contemporary community standards for the broadcast medium. We also do not find that NBC Telemundo's parental advisory prior to its broadcast of "Con El Corazon En La Mano" insulates the licensee from liability.[61]

39. In sum, because the material is explicit and graphic, is dwelled upon, and is shocking, we conclude that its broadcast was patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time

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[58] Response at 8.

[59] *Id.* at 7-8.

[60] *Saving Private Ryan*, 20 FCC Rcd at 4512-13, ¶ 14.

[61] *See Pacifica*, 438 U.S. at 748-49 (holding that warnings are not necessarily effective because the audience is constantly changing stations).

frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[62] Therefore, there was a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

40. ***Forfeiture Calculation.*** In the instant case, we find that NBC Telemundo consciously and deliberately broadcast the film in question. Accordingly, we find that NBC Telemundo's apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.

41. We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case. We find that the statutory maximum, $32,500,[63] is appropriate for several reasons. As discussed in detail above, the scene is extremely shocking, depicting a violent rape in a graphic and sustained manner. Also, the broadcast was prerecorded. NBC Telemundo knew that the film contained this material and should have taken efforts to edit the scene. Indeed, NBC Telemundo did include a warning of the upcoming scene. Although inclusion of a warning might warrant a lower forfeiture under certain circumstances, we find that it does not here in light of all of the circumstances surrounding the apparent violation, including the shocking and gratuitous nature of the scene and the fact that

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[62] *See* 47 C.F.R. § 73.3999.

[63] The subject broadcast occurred after the September 7, 2004, effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is $32,500. *See supra* ¶ 21.

it was prerecorded. Therefore, we find that NBC Telemundo is apparently liable for a forfeiture of $32,500 for its October 9, 2004 broadcast of "Con El Corazon En La Mano."

42. Although other stations may have broadcast the material at issue here between 6 a.m. and 10 p.m., we propose a forfeiture against only the licensee and station whose broadcast of the material was actually the subject of a viewer complaint to the Commission. We recognize that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming.[64] Our commitment to an appropriately restrained enforcement policy, however, justifies this more limited approach towards the imposition of forfeiture penalties.[65]

3. "Fernando Hidalgo Show" (October 19, 2004)[66]

43. ***The Programming.*** The Commission received a complaint alleging that Station WJAN-CA, Miami, Florida, aired indecent material during the October 19, 2004 broadcast of the program the "Fernando Hidalgo Show," a Spanish-language talk show. The complaint refers to a segment that involved partial female adult nudity. The segment was more than fifteen minutes in duration.

44. On February 11, 2005, the Bureau sent a letter of inquiry to Sherjan Broadcasting Company, Inc., the licensee of Station WJAN-CA, concerning the material

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[64] *See supra* note 48.

[65] *See supra* ¶ 11 and note 11.

[66] FCC File No. EB-04-IH-0625.

described above allegedly broadcast over the station.[67] Sherjan responded by letter dated March 14, 2005.[68] As confirmed by the videotape of the program provided by Sherjan, during the segment in question, the host introduces a female guest by stating, "before we present Juliana I want to tell the gentlemen to be careful because she is dressed in a way that can cause a heart attack."[69] The female guest then appears in an open-front dress, with her nipples covered, but her breasts otherwise fully exposed. As she makes her entrance, she pirouettes in front of the audience, then shakes her breasts towards the cameras. When she turns to face the host, he briefly stares at her breasts, then mugs for the camera. Sherjan acknowledges that the material in question was aired over Station WJAN-CA at 7:00 p.m. on October 19, 2004, and that the female guest appeared in an open-front dress.[70] However, Sherjan maintains that the complained-of material is not actionably indecent be-

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[67] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Sherjan Broadcasting Company, Inc. (February 11, 2005) ("LOI").

[68] *See* Letter from Peter Tannenwald, Irwin, Campbell & Tannenwald, P.C., to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (March 14, 2005).

[69] *Id.* at Attachment 2 (licensee's English-language translation of broadcast). Also according to the licensee's translation, immediately before the woman appears on stage, the host asks another guest, "Do you know Juliana?" The guest states that she knows "Juliana How Bad You Are," a popular Spanish-language song. The host replies, "Well this one is worse than that! And we're going to present her now!" *Id.*

[70] *Id.*

cause it is "a comedy routine" and does not shock or titillate.[71]

45. ***Indecency Analysis.*** We find that the programming at issue is within the scope of our indecency definition because it depicts sexual organs—specifically an adult woman's breasts. Sherjan argues that the complained-of material "did not include any description of sexual or excretory functions in either the video or audio portion, let alone graphic descriptions."[72] However, the indecency definition clearly encompasses depictions of sexual organs as well as sexual activities.[73] Moreover, the explicitness of the depiction is not relevant to the threshold issue of whether the material depicts or describes a sexual or excretory organ or activity, and is more appropriately considered in our analysis of whether the material is patently offensive.

46. Turning to that issue, we find that, based on our contextual analysis, the material in question is patently offensive as measured by contemporary community standards for the broadcast medium. With respect to the first factor of our contextual analysis, we find that the material is explicit and graphic. The material clearly depicts a woman's naked breasts, which are sexual organs. In this respect, this case is similar to other cases in which we have held depictions of nudity to be

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[71] *Id.* at 2

[72] *Id.* at 1-2.

[73] *See, e.g., Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19235 ¶ 11 (2004) ("*Super Bowl NAL*") (finding that Super Bowl halftime show, which displayed a bare female breast, satisfied subject matter prong of indecency analysis).

graphic and explicit.[74] The fact that the guest's nipples are covered with jewelry does not render the depiction of her breasts, which were otherwise fully exposed, insufficiently graphic to weigh in favor of a finding of patent offensiveness.[75] Here, the audience had a sustained view of the guest's breasts from several different angles, and the dress only served to enhance the view.

47. With respect to the second factor of our analysis, we find that the broadcast dwells on the sexual material. The guest's naked breasts are visible throughout much of the segment in question, which lasts more than fifteen minutes.[76] Furthermore, the camera focuses on the female guest's torso during much of that time. We have repeatedly held that repetition and persistent focus on sexual or excretory material is a relevant factor in evaluating the offensiveness of broadcasts.[77]

48. With respect to the third factor, we find that the female guest's partial nudity shocked, pandered to, and titillated the audience. Indeed, the behavior of the guest

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[74] *Id.*, 19 FCC Rcd at 19235 ¶ 13 (finding that a broadcast, which showed a performer's exposed breast, was graphic and explicit). *See also Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1755 ¶ 11 (2004) ("*Young Broadcasting NAL*") (finding that a broadcast of performer's exposed penis was graphic and explicit).

[75] *See Super Bowl NAL*, 19 FCC Rcd at 19235-36, ¶ 13 (finding that a broadcast of performer's exposed breast was "clearly graphic," even though breast was partially covered).

[76] In this connection, we note that in the *Super Bowl NAL*, we found that the broadcast of an exposed breast was indecent, even though it lasted less than one second. *Id.*

[77] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); *see also Married By America NAL*, 19 FCC Rcd at 20195 ¶ 11; *Entercom Seattle Order on Review*, 19 FCC Rcd at 9073-74 ¶ 13.

and the host as she came on stage highlighted the titillating nature of the material. Finally, we reject the licensee's contention that the material broadcast is not indecent because it is "a comedy routine." Even if this segment was comedic, it is well settled that comedy formats do not insulate otherwise indecent material.[78]

49. In sum, we find that the broadcast material referenced in the complaint contains an explicit and graphic depiction of sexual organs, and that the nudity is dwelled upon and shocked, pandered to, and titillated the audience. Therefore, we find that the material is patently offensive as measured by contemporary community standards for the broadcast medium and is apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[79] Therefore, there is a reasonable risk that children may have been in the viewing audience at the time that the material at issue was broadcast, and the broadcast is legally actionable.

50. ***Forfeiture Calculation.*** In the instant case, Sherjan consciously and deliberately aired the "Fernando Hidalgo Show." By airing the complained-of material, we find that Sherjan's apparent violation of section 73.3999 and 18 U.S.C. § 1464 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.

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[78] *See Pacifica*, 438 U.S. at 744 (upholding the Commission's finding that the broadcast of a comedy monologue featuring references to sexual activities and organs was patently offensive and violated the statutory prohibition on indecency).

[79] *See* 47 C.F.R. § 73.3999.

51. We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case. For the following reasons, we propose a forfeiture of $32,500, the statutory maximum, for this broadcast.[80] The scene is sustained, lasting 15 minutes, and contains no warning of the adult-oriented content. In addition; the gravity of the apparent violation is heightened because of its egregious nature. Thus we find Sherjan Broadcasting Company, Inc. is apparently liable for a forfeiture of $32,500 for its October 19, 2004 broadcast of the "Fernando Hidalgo Show."

4. "Video Musicales" (February 2 - March 8, 2002)

52. ***The Programming.*** The Commission received a series of written complaints from individuals associated with the group D'Vanguardia ("Complainants") alleging that Aerco Broadcasting Corp. ("Aerco"), licensee of Station WSJU-TV, San Juan, Puerto Rico, repeatedly broadcast indecent material between the hours of 6:00 a.m. and 10:00 p.m. during the "Video Musicales" program in early 2002.[81] After reviewing the complaints

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[80] The subject broadcast occurred after the September 7, 2004 effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is $32,500. *See supra* ¶ 21.

[81] *See* Letter from David Ramos and Gloria Cardona, D'Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (March 12, 2002); Letter from David Ramos and Gloria Cardona, D'Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (March 2, 2002); Letter from David Ramos and Gloria Cardona, D'Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 26, 2002); Letter from David Ramos to David Solomon,

and videotapes provided by the Complainants, the Bureau directed a letter of inquiry to Aerco requesting further information about the music videos that Station WSJU-TV allegedly broadcast,[82] specifically including "DJ Joe, Fatal Fantasy 2—Feat, Trebol, Clan,"[83] "DJ Joe, Fatal Fantasy 2—Feat, Nejo, Speedy,"[84] "Operation Sandunga,"[85] and a promotional spot for a DVD entitled "Dangerous—Fatal Fantasy 2."[86]

53. Aerco responded to the Bureau's letter on March 23, 2004, providing a Spanish transcription and English translation of each of the music videos and other material.[87] Aerco states that it is not able to confirm whether it broadcast some of the material at the times and dates provided in the complaints and whether the music videos and other material on the videotape provided by the Complainants accurately reflect Station WSJU-TV's broadcasts.[88] However, Aerco did not pro-

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Chief, Enforcement Bureau, Federal Communications Commission (February 26, 2002); Letter from Gloria Cardona and David Ramos, D'Vanguardia, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (February 22, 2002).

[82] See Letter from Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, to Aerco (December 24, 2003) ("LOI").

[83] FCC File Nos. EB-02-IH-0167, EB-02-IH-0198.

[84] FCC File Nos. EB-02-IH-0167, EB-02-IH-0199.

[85] FCC File Nos. EB-02-IH-0167, EB-02-IH-0199.

[86] FCC File No. EB-02-IH-0258.

[87] *See* Letter from John A. Borsari to Marlene H. Dortch, Secretary, Federal Communications Commission at Exhibits 1-A—6-B (March 23, 2004) ("Response").

[88] *Id.* at 1-5. Aerco states that several music videos, all entitled "Fatal Fantasy 2," were broadcast between January and March 2002. Thus, Aerco claims it cannot confirm the dates and times for the airing

vide any documentation that challenged or raised questions about any of the complaints or videotapes made by the Complainants. Aerco also did not provide a complete record of its program logs for the dates alleged in the complaints.[89]

54. Aerco asserts that it is not aware of any other complaints about the material in question and thus contends that each of the complaints represents only a single viewer who objects to the broadcast matter.[90] In addition, Aerco asserts that, in many instances, significant portions of the material are inaudible and thus an ordinary viewer would be not be able to understand the lyr-

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of the specific videos "DJ Joe, Fatal Fantasy 2—Feat, Trebol, Clan" or "DJ Joe—Fatal Fantasy 2." *Id.* at 2-3. In regard to "Operation Sandunga," Aerco states that it does not have any records of such a titled music video. *Id.* at 4. It asserts that Aerco broadcasts programs produced by independent producers after 10:00 p.m. and some of these broadcasts contain music videos that would not be reflected in Aerco's program logs. *Id.* at 4-5. Aerco further asserts that since these broadcasts are aired after 10:00 p.m., "Operation Sandunga" could not have been broadcast between 10:00 a.m. and 10:52 a.m., as alleged in the complaints. *Id.* at 5. Aerco confirms that it broadcast the promo for "Dangerous—Fatal Fantasy 2" on the four dates alleged in the Bureau LOI, but is unable to confirm the broadcast times. *Id.* at 4.

[89] *Id.* at Exhibit 7. In response to the Bureau LOI, Aerco provided a program log for only one of the nine days mentioned in the complaints. Aerco also provided program logs for multiple days not mentioned in the Bureau LOI. The program logs list dates and times of program material, but provide only partial titles of the music videos played. Thus, there are multiple entries for a program entitled "Fatal Fantasy," which could be any of three videos discussed in this *Notice of Apparent Liability*. Because of the confusing nature of Aerco's program logs and the fact that Aerco does not dispute the times and dates listed in the videotapes provided by the Complainants, we will rely only on the videotapes as the basis for the proposed forfeiture here.

[90] *Id.* at 8.

ics. Aerco explains that it hired an independent firm to prepare the transcript to respond to the Bureau's LOI, which isolated the music portion from the speaking portion to identify the lyrics.[91] Aerco asserts that the lyrics do not contain offensive or indecent language and that there were no nude scenes that would satisfy the Commission's standards for the definition of indecency.[92] Aerco concedes that some of the material is suggestive, but that any "sexual or excretory import to the innuendo or artistic license taken by the performers is subject to individual interpretation and to be categorized as indecent, and not merely poor taste, such innuendo must be unmistakable."[93]

55. *"DJ Joe, Fatal Fantasy 2—Feat, Trebol, Clan."* This song repeatedly mentions the singer's near-constant state of sexual arousal. There is a segment of the video in which a boy appears to masturbate in a bathroom stall. The lyrics accompanying the segment translate as follows:

> When I had been barely born, I instantly knew where I had come from. Since then until I grew up, I have always yearned to be inside a similar hole. In elementary school they called me Mr. Corner. In intermediate school they called me "little masturbator" because this is where my vice of rubbing myself incessantly began.[94]

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[91] *Id.* at 8-9.

[92] *Id.* at 9-10.

[93] *Id.* at 10.

[94] This translation is based upon our review of the material at issue. Aerco provides the following translation (the parenthetical is in Aerco's translation):

56. *"DJ Joe, Fatal Fantasy 2—Feat, Nejo, Speedy."* There are multiple segments in which women clad in bikini tops and thongs bend away from the camera—exposing their buttocks to the viewer—and simulate sexual intercourse. The music video includes a specific scene of a woman bending away from the camera wearing a thong while one of the male singers slaps her on the buttocks. The lyrics accompanying the segment translate as follows:

> I pushed her from the front. I took her and had her. I took her bra off. I lowered her panties like old times. I will give it to you through the ass. I will give it to you through the ass.[95]

57. *"Dangerous—Fatal Fantasy 2."* This promo for a DVD includes multiple scenes with scantily-clad women fondling themselves and each other in a sexual fashion. For example, there are scenes in which females caress their breasts, buttocks and/or genital area. The promo also includes several close-up camera shots of

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> Just barely a newborn, I soon knew where I'd come out from. Since then and until I grew up, in the same kind of hole I always like to be. In elementary school they called me "Mr. Hop." In junior high they called me "Punecinco" (invented word), because that's when I got into the habit of pleasing myself.

Response at Exhibit 1-B.

[95] This translation is based upon our review of the material at issue. Aerco provides the following translation:

> I used to push her with my front part and with my chest far away. I used to take her and screw her. The brassieres I used to take off, the panties I used to take down, like in the old days, I'm giving it to you, I'm giving it to you.

Response at Exhibit 3-B.

thong-clad buttocks, of scantily-clad breasts and crotches, and of a woman removing her top (with the shot changing just before her breasts are completely exposed). Some of these scenes also show a woman applying baby oil to another woman's buttocks and women caressing each other's breasts and buttocks.

58. *"Operation Sandunga."* This material contains scenes with scantily-clad women depicting lap dances and a scene simulating oral sex. In one scene, the male singer is seated on a sofa with his legs spread apart. In between his legs kneeling on the floor is a female with her back to the camera whose head bobs up and down over the male's genital area, simulating oral sex. In other scenes, the woman is also variously shown kneeling and gyrating between his legs or straddling one leg and gyrating with her chest in his face. According to Aerco, the lyrics for the scene in which oral sex is simulated translate to: "You have to lick, lick, lick, lick, lick . . . You have to lick, mami, really 'be' . . . 'tra', [sic] to feel my thing and lick, mami, really 'be' . . . 'tra', [sic] to feel my thing."[96]

59. ***Indecency Analysis.*** For the reasons discussed below, we find that each of the complained-of videos and promo is apparently indecent.

60. *"DJ Joe, Fatal Fantasy 2 Feat, Trebol, Clan."* The material dwells on the singer's near-constant state of arousal, depicts a male child simulating masturbation, and the accompanying lyrics also refer to masturbation. We find, therefore, that the material meets the first prong of our indecency analysis.

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[96] *Id.* at Exhibit 6-B (punctuation included in the original).

61. Turning to the three principal factors that comprise our contextual analysis, as mentioned above, we also find that the material, in the context presented, is patently offensive under contemporary community standards for the broadcast medium. With respect to the first factor, the material explicitly depicts a male child simulating masturbation, and includes lyrics also graphically and explicitly describing masturbation, including characterization of the child as a "masturbator," and a description of "rubbing himself" incessantly. We find, with respect to the second factor, that the material repeatedly discusses the singer's sexual arousal. We also find that the simulated masturbation and lyrics that refer to masturbation by a male child are not only pandering and titillating, they are shocking.

62. *"DJ Joe, Fatal Fantasy 2—Feat, Nejo, Speedy."* We find that this material depicts simulated sexual activity between a woman in a thong and a male singer. The lyrics accompanying this depiction refer to sexual activity, including "I took her and had her," "I lowered her panties like old times," and "I will give it to you through the ass." This material also depicts and describes the buttocks, which are sexual and excretory organs.[97]

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[97] *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (Supreme Court did not disturb a city's indecency ordinance prohibiting public nudity, which listed the buttocks as among the body parts subject to the ordinance's ban on nudity); *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256, 269 (2d. Cir. 1999) (upholding state district court's determination that Time Warner's decision to not transmit certain cable programming that it reasonably believed indecent (some of which included "close-up shots of unclothed breasts and buttocks") did not run afoul of the Constitution).

63. We also find that the material, in the context presented, is patently offensive under contemporary community standards for the broadcast medium. The segment depicts simulated sexual intercourse and contains lyrics that graphically and explicitly describe sexual activities ("I will give it to you through the ass"). In this segment, women's buttocks are also clearly visible on screen. The segment dwells on and repeats the sexual material, the second factor in our analysis. We have repeatedly held that repetition and persistent focus on sexual material is a relevant factor in evaluating the potential offensiveness of broadcasts.[98] The camera angles throughout repeatedly dwell on shots that provide views of the female dancers' buttocks. The segment is focused entirely on the repetition of simulated sexual activity with accompanying lyrics that describe such activity. With respect to the third factor, we find that the simulated sexual activity, accompanied by explicit lyrics that reference sexual activity ("I will give it to you through the ass"), and the persistent visual focus on the female dancer's buttocks are presented in a manner that is obviously pandering and titillating.

64. *"Dangerous—Fatal Fantasy 2."* We find that this material meets the first prong of the Commission's indecency test. The material includes close-up shots of thong-clad buttocks, breasts and crotches, as well as females fondling their breasts, buttocks and genital areas while they dance, gyrate, and fondle one another in a sexually suggestive manner. These scenes clearly depict sexual organs and activities.

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[98] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); *see also Married By America NAL*, 19 FCC Rcd at 20195 ¶ 11; *Entercom Seattle Order on Review*, 19 FCC Rcd at 9073-74 ¶ 13.

65. We also find that this material, in the context presented, is patently offensive under contemporary community standards for the broadcast medium. The material contains close-up shots of thong-clad buttocks, a female fondling her genital area, and women caressing their own breasts and buttocks as well as those of others. Thus, we conclude that the material is graphic and explicit. Second, while not dispositive, it is relevant that these types of images appear numerous times throughout the promo and, therefore, that sexual images are sustained and repetitious. Finally, the close-up shots of thong-clad buttocks and women fondling their own breasts, buttocks and genital areas as well as the breasts and buttocks of other women in a sexually suggestive manner are presented in a pandering and titillating manner. Indeed, this material appears to have little other purpose. Therefore, because the complained-of material is explicit and graphic, repeated, and is pandering and titillating, we conclude that the promo is patently offensive and thus indecent.

66. *"Operation Sandunga."* This material meets the first prong of the indecency test. As noted above, this material includes a scene and lyrics describing and depicting oral sex, a sexual activity. Accordingly, we find that the material describes and depicts a sexual activity. We also find that the material, in the context presented here, is patently offensive under contemporary community standards for the broadcast medium. With respect to the first principal factor that informs our contextual analysis, the scene and lyrics depict and describe a female performing oral sex in a manner that is graphic and explicit. With respect to the second factor, while not dispositive, it is relevant that sexual references are sustained and repeated. The scene depicting

oral sex is coupled with numerous other scenes depicting the same woman gyrating suggestively as she kneels between the male singer's legs or straddles one of his legs with her chest thrust in his face, apparently simulating a "lap dance." Finally, the graphic depictions of oral sex, joined with the repeated and explicit lyrics in which men direct women to lick their genitals, panders to and titillates the audience. Therefore, because the complained-of material is explicit and graphic, repeated, and shocks, panders, and titillates, we conclude that the video is patently offensive and thus indecent.

67. Aerco states that the music videos and other broadcast material at issue here may be suggestive, but are not indecent or obscene under prevailing standards.[99] Aerco cites the *Indecency Policy Statement* to support its assertion.[100] We disagree with Aerco's analysis. These broadcasts combine sexually explicit language and innuendo with visual depictions that graphically depict the meaning of the lyrics.[101] We also do not

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[99] *See* Response at 10.

[100] *Id.*

[101] To the extent that the music videos' and the promo's use of visual images in conjunction with lyrics to describe and depict sexual activity could be described as innuendo rather than direct references, they are nonetheless sufficiently graphic and explicit to render the material actionably indecent because the sexual import of those images in conjunction with those lyrics was "unmistakable." *See Married By America NAL*, 19 FCC Rcd at 20194 ¶ 10 (proposing forfeiture for airing nudity, finding that despite electronic blurring ("pixilation") "even a child would have known the strippers were topless and that sexual activity was being shown"). *See also Indecency Policy Statement*, 16 FCC Rcd at 8003-04 ¶ 12; *Telemundo of Puerto Rico License Corp. (WKAQ-TV)*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 7157, 7159, ¶ 8 (Enf. Bur. 2001) (forfeiture paid) ("*Telemundo NAL*").

agree with Aerco's argument that the lyrics are barely intelligible.

68. According to the Complaints and videotapes, Aerco broadcast each of the music videos and the promo on multiple occasions. Aerco, in its *Response*, states that it is unable to determine whether it broadcast "DJ Joe, Fatal Fantasy 2—Feat, Trebol, Clan" or "DJ Joe—Fatal Fantasy 2—Feat, Nejo, Speedy" because its program logs list three music videos with similar titles.[102] Aerco confirms that the promo for the DVD titled "Dangerous—Fatal Fantasy 2" aired on the four dates alleged in the complaints, but states that it is unable to determine the broadcast times.[103] Aerco also asserts that it is unable to determine whether "Operation Sandunga" was aired on the date alleged in the complaint because it has no records of this music video.[104] Aerco states that it broadcast programs produced by independent producers after 10:00 p.m. and that it "could" have aired the independently produced "Operation Sandunga" music video during this time period.[105]

69. Based on the complaints and the accompanying videotapes, and in the absence of any evidence to the contrary,[106] we find that Aerco broadcast each of the music videos and the promo in question multiple times—a total of at least 14 broadcasts—between the hours of

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[102] *See* Response at 2-3.

[103] *Id.* at 4.

[104] *Id.* at 4.

[105] *Id.* at 4-5.

[106] *See Entercom Sacramento License, LLC,* Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20129 ¶ 5 (2004) (proposing a forfeiture in a case where the licensee could not deny the broadcast occurred).

6 a.m. and 10 p.m., the time frame relevant to an indecency determination.[107] Because there is a reasonable risk that children may have been in the audience when the material in each was broadcast, the material broadcast is legally actionable. By broadcasting this material during these times over Station WSJU-TV, Aerco apparently violated the prohibitions in the Act and the Commission's rules against broadcast indecency.

70. ***Forfeiture Calculation.*** Aerco consciously and deliberately broadcast the videos and the DVD promo. Accordingly, we find that the broadcasts in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 were willful within the meaning of section 503(b)(1) of the Act. Additionally, Aerco aired this material a total of 14 times. Accordingly, we find that Aerco's apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was also repeated.

71. We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case. Based on consideration of the statutory factors, we find it is appropriate to use the statutory maxi-

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[107] *See* 47 C.F.R. § 73.3999. Based on the videotape and data provided by the Complainants, we conclude that the station aired "DJ Joe, Fatal Fantasy 2—Feat, Trebol, Clan" between the hours of 6:00 a.m. and 10:00 p.m. on February 2 (12:00-12:43 p.m.), 22 (5:00-6:30 p.m.), 26 (3:00-3:30 p.m.) and 28, 2002 (2:05-2:50 p.m.); "DJ Joe, Fatal Fantasy 2—Feat, Nejo, Speedy" on February 22 (5:30-6:30 p.m.), 26 (6:00-6:30 p.m.), March 6 (10:00-10:52 a.m.), and 27 (5:45-5:48 p.m.). We also find that the station aired "Dangerous—Fatal Fantasy 2" on February 28 (2:05-2:50 p.m.), March 1 (1:13-1:53 p.m.), 4 (6:50 p.m.), 5 (9:40-10:17 a.m.) and 8, 2002 (11:51 a.m.-12:55 p.m.). We also find that the station aired "Operation Sandunga" on March 6, 2002, between 10:00 and 10:52 a.m.

mum amount of $27,500[108] to calculate the proposed forfeiture in this case. The gravity of the apparent violations is heightened in this case because, as discussed above, the music videos and the DVD promo at issue are extremely graphic and explicit, including close-up scenes of sexual fondling and simulated oral sex, which are repeated throughout the material. One broadcast segment explicitly depicts a child masturbating, and another repeatedly displays women's buttocks in a pandering and titillating manner. All of the material depict and describe sexual organs or activities in a highly shocking, vulgar, and gratuitous manner. In addition, this material could have been reviewed by Aerco prior to broadcast. Multiplying the statutory maximum amount of $27,500 by the 14 broadcasts at issue here results in a total forfeiture amount of $385,000. Under the specific circumstances of this case, however, we believe that such a forfeiture would be excessive to achieve the appropriate level of punishment and deterrence and that $220,000 is a more appropriate amount. We base this conclusion on several factors, including the fact that Aerco is the licensee of only San Juan, Puerto Rico, Stations WSJU-TV and WQBS(AM) and that it has no prior indecency violations. Therefore, for the reasons stated above, we propose a forfeiture of $220,000 against Aerco Broadcasting Corp. for its willful and repeated violations of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999.

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[108] The subject broadcasts occurred prior to the September 7, 2004, effective date of the most recent adjustment of the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is $27,500. *See supra* ¶ 21.

5. "The Blues: Godfathers and Sons" (March 11, 2004)[109]

72. *The Programming.* The Commission received a complaint alleging that San Mateo County Community College District ("San Mateo"), licensee of noncommercial educational Station KCSM-TV, San Mateo, California, aired indecent material over the station during its broadcast of the program "The Blues: Godfathers and Sons" on March 11, 2004 between the hours of 8:42 and 9:32 p.m. Pacific Standard Time.[110] The complaint alleged that the broadcast, an episode of a prerecorded documentary series provided by the Public Broadcasting Service ("PBS"), contains numerous "obscenities," including the "F-Word," the "S-Word" and various derivatives of those words, in violation of the Commission's rules restricting the broadcast of indecent material.[111]

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[109] FCC File No. EB-04-IH-0260.

[110] *See* Letter from complainant to the Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission March 18, 2004) ("Complaint").

[111] According to the Complaint, the program includes the following objectionable utterances broadcast between 8:42 and 9:32 p.m.:

8:42 p.m..: "See those, motherfucker? Gotta pay those motherfucking notes."
8:51 p.m.: "What's my job? You stupid motherfucker, your job is to follow me."
9:00 p.m.: "Shit it's good to be next to you."
9:04 p.m.: "there's no white bullshit with [Paul] Butterfield."
9:13 p.m.: "I'll buy some shit."
9:14 p.m.: "This is the kind of shit I buy."
9:23 p.m.: "Cocksucker Blues" (used as an on-screen Chyron to identify a song title).
9:32 p.m.: "This poor fucker."

The complainant therefore asked that the Commission investigate and take appropriate enforcement action.

73. Thereafter, the Bureau sent a letter of inquiry to San Mateo, attaching a copy of the Complaint.[112] In its response, San Mateo acknowledges that it aired "The Blues: Godfathers and Sons," a documentary containing interviews of blues performers and a record producer, over Station KCSM-TV as alleged, between 8 and 10 p.m. on March 11, 2004, but not on any other dates between 6:00 a.m. and 10:00 p.m.[113] With its response, San Mateo provided a DVD and a written transcript of the program.[114] San Mateo does not dispute that it aired the material described in the complaint. It states, "[t]he intent of the program is to provide a window into [the world of the individuals being interviewed] with their own words, all of which becomes an educational experience for the viewer." Thus, San Mateo maintains that the language contained in the program was not "used in a prurient way, but rather as an infrequent conversational expression of the artist [being interviewed], and was not edited to remove their dialogue, which accurately reflected their viewpoints."[115] San Mateo represents that, subsequent to its station's airing of the program, PBS alerted its member stations that this and

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[112] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to San Mateo (August 4, 2004) ("LOI").

[113] *See* Letter from Marilyn R. Lawrence, General Manager, KCSM-TV/(FM), to David Brown, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau (August 27, 2004) ("Response") at 1.

[114] *Id.*

[115] *Id.*

similar PBS-supplied programs contained material that might be deemed indecent in light of then-recent Commission rulings, and advised licensees that PBS had changed its procedures involving the editing of potentially indecent or offensive language in programming that it provides them and will now alert licensees to potential problems.[116]

74. ***Indecency Analysis.*** The Commission determined in its *Golden Globe Awards Order* that the "F-Word" meets the first prong of the indecency test. We stated, "given the core meaning of the "F-Word," any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."[117] Similarly, we now find that the "S-Word," at issue here, has an inherently excretory connotation. In light of the core meanings of the "F-Word" and "S-Word," any use of those terms inherently has sexual or excretory connotations and falls within the first prong of our indecency definition.[118]

75. We also find that the broadcast material is, in context, patently offensive as measured by contemporary community standards for the broadcast medium. First, as we stated in *Golden Globe Awards Order*, the "F-Word" is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image."[119]

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[116] *Id.* San Mateo appears to refer to the *Golden Globe Awards Order*.

[117] *Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8.

[118] *See Pacifica Foundation*, 56 FCC 2d at 99.

[119] *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9.

Similarly, we find the "S-Word" to be one of the most vulgar, graphic and explicit words relating to excretory activity in the English language. Use of the "S-Word" invariably invokes a coarse excretory image. Consequently, we conclude that the broadcast by San Mateo of a program containing numerous uses of the "F-Word" and the "S-Word," under the circumstances presented here, is vulgar, graphic, and explicit.

76. Second, the program repeats this language numerous times during the broadcast. We note that, while prior FCC staff actions had indicated as of the date this program aired that isolated broadcasts of certain expletives were not indecent or would not be acted upon, the program at issue here contains numerous repeated utterances of the "F-Word" and "S-Word," and their variants. Our precedent is clear that broadcasts containing numerous expletives may be actionably indecent.[120]

77. Third, the gratuitous and repeated use of this language in a program that San Mateo aired at a time when children were expected to be in the audience is shocking. While San Mateo contends that the expletives in question were not removed from the program so that the viewpoints of those being interviewed would be accurately reflected, as discussed below we disagree that the use of such language was necessary to express any particular viewpoint in this case.[121] We also note that many of the expletives in the broadcast are not used by blues performers. For example, based on our review of the

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[120] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 16 (*citing Back Bay NAL*, 14 FCC Rcd at 3998, which found the broadcast of repeated uncensored uses of the "F-Word," among other expletives, to be indecent).

[121] *See infra* ¶ 82.

DVD and transcript, Marshall Chess, a former label owner and record producer, states in discussing the relationship between Chess Records and its artists, "my dad had so many people at his funeral, my uncle said, 'You see all those motherfuckers? They're coming to make sure he's dead, so they don't have to pay back those motherfuckin' notes.'" In another scene, discussing his relationship with his father at Chess Records, Marshall Chess states, "[h]e said, 'What's your job? You stupid motherfucker! Your job is watching me!'" During a scene showing hip-hop artists Kyle Jason, Juice, and Chuck D. shopping in a record store with Chess, Kyle Jason states, "I'll buy some shit," and Juice states, "This looks crazy! See that? This is the kind of shit I buy! I mean, my man is wearing pink gear—that shit, that shit is crazy right there! I'm buyin' it!"

78. In sum, because the expletives in the program are vulgar, explicit, graphic, dwelled upon and shocking to the audience, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[122] Therefore, there is a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

79. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of 18 U.S.C.

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[122] *See* 47 C.F.R. § 73.3999.

§ 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." We indicated in that decision that the Commission would analyze other potentially profane words on a case-by-case basis.

80. The "F-Word" is a vulgar sexual term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. It is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home. Consistent with our decision in the *Golden Globe Awards Order*, we find here that the use of the "F-Word" in the program at issue violated 18 U.S.C. § 1464's prohibition of the broadcast of "profane" language.[123]

81. In addition, we find that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. Like the "F-Word," it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

82. As noted previously, in rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[124] However, we will find this to be the case only in unusual circumstances, and such circumstances are not present

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[123] *Id.* at 4981 ¶¶ 13-14.

[124] 20 FCC Rcd at 4512-14 ¶¶ 13-18.

here. Although in this case the profane language may have had some communicative purpose, we do not believe that San Mateo has demonstrated that it was essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance, or that the substitution of other language would have materially altered the nature of the work. In this respect, this case is unlike *Saving Private Ryan*, where we concluded that deleting offensive words "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."[125] While we recognize here that the documentary had an educational purpose, we believe that purpose could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives.

83. It is undisputed that the complained-of material, including the "F-Word" and the "S-Word," was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast on March 11, 2004, the material broadcast is legally actionable.[126]

84. ***Forfeiture Calculation***. San Mateo consciously and deliberately broadcast this episode. Accordingly, we find that the broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.[127] Taking into account the statutory fac-

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[125] *Id.* at 4512-13 ¶¶ 13-14.

[126] *See ACT III*, 58 F.3d at 660-63.

[127] Because the broadcast in question was aired prior to the release of the *Golden Globe Awards Order*, our profanity finding will not factor

tors and the circumstances of this case, we conclude that the appropriate proposed forfeiture in this case is $15,000.

85. The Commission's prohibition on the repeated use of expletives, including the "F-Word" and "S-Word," was well settled prior to March 2004.[128] The complained-of material contains numerous unedited expletives. The program in question was supplied to the licensee by PBS replete with two words that are among the most vulgar, graphic, and explicit descriptions of sexual and excretory activity in the English language, but whose propriety San Mateo nevertheless failed to question. By broadcasting the program complete with these expletives, San Mateo effectively abdicated this aspect of its programming control to an outside entity, PBS.[129] On

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in our determination of any sanction in this case.

[128] *See, e.g., Pacifica*, 438 U.S. at 744 (upholding the Commission's finding that the broadcast of the comedy monologue "Filthy Words" featuring, among other things, repeated uses of the F-Word and the S-Word was patently offensive and violated the statutory prohibition on indecency).

[129] San Mateo states that its arrangement with PBS required that it defer for several months from broadcasting the program, which aired over most PBS stations in October and November 2003. San Mateo represents that, because its scheduling is done three months in advance of the actual airdate, "the decision to air this series was made in November since the first episode of the series was aired in February." *Response* at 1. To the extent that San Mateo cites this circumstance to suggest that it did not have adequate notice that the expletives contained in the program were prohibited from broadcast prior to the Commission's issuance of the *Golden Globe Awards Order* on March 18, 2004, we reject this contention. To the contrary, San Mateo had months after the national airing of the episode at issue to ascertain the questionable content of the program and to take steps to ensure that it did not broadcast the repeated uses of objectionable words at issue.

the other hand, however, we do recognize that the expletives here were contained in a documentary, and while we conclude that the arguments made by the licensee are mistaken, we do find that the licensee may have been under the good faith belief that the use of these expletives served a legitimate informational purpose. Additionally, we recognize the fact that the licensee runs a small, community station that airs college level educational courses for most of the day. Under these circumstances, we believe that a proposed forfeiture in the amount of $15,000 is warranted here.[130]

86. Although other stations may have also broadcast the subject episode of "The Blues: Godfathers and Sons," we propose a forfeiture only against San Mateo as the only licensee with a station whose broadcast of the material between 6 a.m. and 10 p.m. was the subject of a viewer complaint filed with the Commission.[131] We recognize that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming.[132] We find, in this case, however, that, in the absence of complaints con-

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[130] We exercise our prosecutorial discretion not to propose forfeitures based on the multiple utterances of expletives in this case because the use of individual expletives was not actionable under Commission precedent prior to the *Golden Globe Awards Order*. *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12. While repetition of expletives in certain scenes might have qualified as actionable before the *Golden Globe Awards Order*, we decline to establish a method of identifying multiple utterances that applies only to pre-*Golden Globe Awards Order* programs.

[131] The fact that San Mateo may not have originated the programming in question is irrelevant to whether there is an indecency violation. *See supra* note 47.

[132] *See supra* note 48.

cerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained about that program. Our commitment to an appropriately restrained enforcement policy, however, justifies this more limited approach towards the imposition of forfeiture penalties.[133] Accordingly, we propose a forfeiture of $15,000 against San Mateo.

6. "The Pursuit of D.B. Cooper" (March 15, 2003)[134]

87. ***The Programming.*** A viewer filed a complaint with the Bureau alleging that Station KTVI(TV), St. Louis, Missouri, licensed to KTVI License, Inc ("KTVI"), repeatedly aired the "S-Word" on the afternoon of Saturday, March 15, 2003, during the broadcast of a movie featuring a fictional account of the fate of D.B. Cooper, the alias used by a person who disappeared after skyjacking an airplane and extorting money from an airline in 1971. The movie contains numerous scenes in which the "S-Word" is used: a scene in which D.B. Cooper refers to an aborted disguise ("shit"); a flashback scene between Cooper and his then—commanding officer ("horseshit"); a scene between the insurance investigator pursuing Cooper and the investigator's boss ("shit"); a café scene ("bullshit"); a scene between Cooper's father and ex-wife in which she describes Cooper as having a "shit-eating grin;" a scene after a fire ("bullshit" used twice); a scene during which Cooper escapes from his pursuers by boarding a river raft ("oh, shit!"); and a scene in which a former crony of Cooper buys a

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[133] *See supra* ¶ 11 and note 11.

[134] FCC File No. EB-03-IH-0136.

used car ("bullshit"). In a subsequent scene involving repairs to a car, an auto mechanic claims he will have the car running "slicker'n owl shit" and "smoother'n owl shit." When the car breaks down, Cooper refers back to the mechanic's words ("smoother'n owl shit" twice). At the end of the movie, in scenes in which Cooper is pursued by his former crony and the investigator, the "S-Word" is reiterated on several occasions: in a scene featuring the two pursuers ("shit"); a scene featuring a telephone call between the investigator and his boss ("shit"); a scene taking place aboard an airplane ("shit" and "oh, shit!"); a scene in which Cooper uses the airplane to chase a car driven by his former crony ("holy shit" and "shit"); and a scene after the airplane crashes ("bullshit").

88. The Bureau sent the licensee a letter of inquiry and attached the complaint.[135] KTVI contends that the aired material is not actionably indecent. The licensee argues that the material at issue is not graphic or explicit, that it is not dwelled upon and that it is not titillating or presented for shock value.[136] KTVI does not claim to have provided any parental warnings prior to or during its broadcast of the film, which occurred from 2:00 to 4:00 p.m.[137]

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[135] *See* Letter from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to KTVI License, Inc. (December 30, 2004).

[136] *See* Letter from John C. Quale, Counsel to KTVI License, Inc., to the Investigations and Hearings Division, Enforcement Bureau (January 31, 2005), and accompanying "Response of KTVI(TV), St. Louis, Missouri to FCC Letter of Inquiry" at 2.

[137] *Id.* at 1.

89. ***Indecency Analysis***. KTVI acknowledges - and our review confirms - that the aired movie, "The Pursuit of D.B. Cooper," includes repeated uses of the words "shit," "bullshit," and "owl shit."[138] Each of those terms, of course, has a clear excretory connotation and describes an excretory activity. Thus, the complained-of material falls within the first prong of our indecency definition.

90. Turning to the second step of our indecency analysis - whether the broadcast material is patently offensive - we conclude, looking at the three principal factors in our contextual evaluation, that the complained-of material is patently offensive under contemporary community standards for the broadcast medium.

91. First, the material is quite graphic and explicit. The "S-Word" is a vulgar, graphic and explicit description of excrement. Its use invariably invokes a coarse excretory image. Consequently, we conclude that the broadcast of a program containing numerous uses of the "S-Word" and its variations, under the circumstances presented here, is vulgar, graphic and explicit.

92. Second, the "S-Word," in various iterations, is used on a number of occasions. We note that, while prior Commission and staff actions had indicated as of the date this program aired that isolated broadcasts of certain expletives were not indecent or would not be acted upon,[139] the program at issue here contains repeated

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[138] These terms will be referred to collectively here in as the "S-Word."

[139] We note that in the *Golden Globe Awards Order*, which was issued after the conduct at issue in this case took place, the Commission overruled prior staff decisions finding that broadcasts containing a single expletive were not indecent. 19 FCC Rcd at 4980 ¶ 12.

utterances of the "S-Word," and its variants. As noted above, the Commission has previously held that repeated use of expletives may be actionably indecent.[140]

93. Third, and most important to our analysis, multiple gratuitous iterations of the "S-Word" broadcast on a weekend afternoon at a time when children are likely to be in the audience, shock, pander to, and titillate the audience.[141] By failing to edit the movie, the licensee needlessly offended unsuspecting viewers in their homes on a weekend afternoon.[142]

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[140] *See Indecency Policy Statement*, 16 FCC Rcd 7999, 8008 ¶ 16 (2001) (citing *Back Bay NAL*, 14 FCC Rcd at 3998, which found the broadcast of repeated uncensored references to the "F-Word," among other expletives, to be indecent).

[141] *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9. *See also Agape Broadcasting Foundation, Inc. (KNOM(FM))*, Notice of Apparent Liability for Forfeiture, 9 FCC Rcd 1679 (Mass Media Bur. 1999) (subsequent history omitted) (citing licensee's decision to run explicit material unedited, during a mid-afternoon broadcast when children were likely to be in the audience), *cited in Indecency Policy Statement*, 16 FCC Rcd at 8014, ¶ 21.

[142] In *Saving Private Ryan*, 20 FCC Rcd at 4513 ¶ 15, we found that that the network "did not intend the broadcast of a feature film as family entertainment, a fact clearly and explicitly stated in the introduction that precedes the film and is repeated in the aural and visual viewer advisory and voluntary parental code that follow each commercial break during the broadcast. Thus, parents had ample warning that this film contained material that might be unsuitable for children and could have exercised their own judgment about the suitability of the language for their children in the context of this film." Unlike *Saving Private Ryan*, we find that the vulgar material here could have been edited without materially altering the broadcast. Additionally, we disagree with the licensee's argument that all of the complained-of material was used as a means of expressing anger or frustration throughout the course of an intense car chase. As a factual matter, it is not correct that all of the material in question occurred during the scenes involving the car chase.

94. In sum, because the material is explicit and graphic, is dwelled upon, and shocks, panders, and titillates, we conclude that its broadcast here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[143] Therefore, there is a reasonable risk that children may have been in the viewing audience and the broadcast is legally actionable.

95. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance."

96. In this case, as in the related cases in this decision, we similarly find that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. For the reasons stated above, use of the "S-Word" invariably invokes a coarse excretory image. Like the "F-Word," it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

97. In rare contexts, language that is presumptively profane will not be found to be profane where it is de-

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Multiple iterations of the "S-Word" occurred in other scenes.

[143] *See* 47 C.F.R. § 73.3999.

monstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[144] We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here. Although in this case, the profane language in this film may have had some communicative purpose, we do not believe that it was essential to the nature of an artistic or educational work or that editing the language would have materially altered the nature of the program. Based upon our review of the record in this case, we conclude that KTVI aired profane material between 6 a.m. and 10 p.m. in violation of 18 U.S.C. § 1464.

98. ***Forfeiture Calculation.*** KTVI consciously and deliberately broadcast this film. Accordingly, we find that the broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of section 503(b)(1) of the Act, and subject to forfeiture.[145] We therefore turn to the proposed forfeiture amount, based on the factors enumerated in section 503(b)(2)(D) of the Act and the facts and circumstances of this case.

99. We find that the statutory maximum of $27,500[146] is an appropriate proposed amount for the March 15, 2003 broadcast. The material was prere-

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[144] *See Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

[145] Because the broadcast in question was aired prior to the release of the *Golden Globe Awards Order*, our profanity finding will not factor in our determination of any sanction in this case.

[146] The subject broadcasts occurred prior to the September 7, 2004, effective date of the most recent adjustment in the statutory maximum forfeiture amount. Accordingly, the appropriate maximum statutory amount here is $27,500. *See supra* ¶ 21.

corded, and KTVI could have edited the content prior to broadcast. In addition, as noted above, the gravity of the apparent violation is heightened here because of its shocking and gratuitous nature, involving as it does multiple gratuitous utterances of vulgar, graphic, and offensive expletives during a weekend afternoon broadcast. The Commission's prohibition of the broadcast of repeated uses of expletives such as the "S-Word" was well settled prior to its broadcast.[147] The program in question was replete with an expletive that is among the most vulgar, graphic, and explicit descriptions of excretory activity in the English language, but which KTVI nevertheless failed to edit out, suggesting indifference to our indecency regulations. Therefore, we find that KTVI License, Inc. is apparently liable for a proposed forfeiture of $27,500 for its March 15, 2003 broadcast of "The Pursuit of D.B. Cooper."[148]

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[147] *See, e.g., Pacifica*, 438 U.S. at 744 (upholding the Commission's finding that the broadcast of the comedy monologue "Filthy Words" featuring, among other things, repeated uses of the S-Word was patently offensive and violated the statutory prohibition on indecency).

[148] We do not propose forfeitures based on each of the multiple utterances of expletives in this case because the broadcast took place before the Commission warned licensees that it might treat separate indecent utterances in the same program as separate violations. *See Infinity Broadcasting Operations, Inc. (WKRK-FM)*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 6915, 6918-19, ¶ 12 (April 3, 2003) ("*WKRK NAL*"), *vacated in non-relevant part*, *Viacom, Inc.*, Order and Consent Decree, 19 FCC Rcd 23100, 23107, ¶ 10 (2004) (vacating all indecency forfeitures against licensee's parent company but preserving the warnings in the *WKRK NAL* that the Commission might propose forfeitures for discrete violations in a single broadcast and might propose to revoke broadcast licenses for egregious or repeat violations).

B. Indecent And/Or Profane Broadcasts But No Forfeiture Proposed

100. In each of the following cases, we find that the broadcasts at issue are indecent and profane. Because of the specific circumstances associated with the broadcasts, however, we do not propose forfeitures. With one exception, these broadcasts preceded the Commission's decision in the *Golden Globe Awards* Order reversing precedent that had suggested that the isolated use of an offensive word like the "F-Word" is not indecent. In light of our decision not to impose a forfeiture based upon the facts of each case, we will not require the licensee of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications and we will not consider the broadcast to impact adversely upon such licensees as part of the renewal process.

1. "The 2002 Billboard Music Awards" (December 9, 2002)[149]

101. ***The Programming.*** The Commission received a complaint concerning the December 9, 2002 broadcast of the "Billboard Music Awards" program over Fox Television Network ("Fox") stations, and specifically Station WTTG(TV), Washington, DC, between 8 and 10 p.m., Eastern Standard Time.[150] The complaint alleges that, during the broadcast, the performer Cher states, "People have been telling me I'm on the way out every year, right? So fuck 'em." The complaint alleges that the expletive was indecent and requests that the Commission

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[149] FCC File No. EB-03-IH-0460.

[150] *See* Letter from Lara Maha[illegible]y, Parents Television Council to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

levy sanctions against each station licensee that aired the material. The Enforcement Bureau obtained a videotape of the offending broadcast that confirms the complaint's allegation.

102. ***Indecency Analysis.*** We held in the *Golden Globe Awards Order* that, given the core meaning of the "F-Word," any use of that word inherently has a sexual connotation and falls within the first prong of our indecency definition.[151] Cher's retort to her critics used language that we have found inherently describes sexual activity. The material, therefore, warrants further scrutiny to determine whether or not it was patently offensive as measured by contemporary standards for the broadcast medium. We conclude, looking at the three principal factors in our contextual analysis, that the material is patently offensive.

103. First, the complained-of material is quite graphic and explicit. As we indicated in the *Golden Globe Awards Order*, the "F-Word" is one of the most vulgar, graphic, and explicit words relating to sexual activity in the English language. Its use invariably invokes a coarse sexual image."[152] We conclude that the broadcast of the "F-Word," under the circumstances presented here, is vulgar, graphic and explicit.

104. Second, the fact that the material is not repeated or not dwelled upon at length, while relevant, is not dispositive. As the Commission indicated in the *Golden Globe Awards Order*: "[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is other-

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[151] 19 FCC Rcd at 4978 ¶ 8.

[152] *Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9.

wise patently offensive to the broadcast medium is not indecent."[153]

105. Third, and most important to our analysis in this specific context, Cher's use of the "F-Word" here, at a live broadcast of an awards ceremony when children were expected to be in the audience, was shocking and gratuitous.[154] Cher chose to express her displeasure with her critics in a highly vulgar and coarse manner, and in doing so, needlessly offended unsuspecting viewers in the peace and quiet of their homes.

106. In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. Technological advances have made it possible to block the broadcast of offensive words without disproportionately disrupting a speaker's message.[155] Fox could have avoided the indecency violation here by delaying the broadcast for a period of time sufficient to ensure that all offending words were blocked.[156] It did not do so. As a result, the Fox affiliate WTTG(TV) broadcast highly offensive material within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules. By broadcasting this material, the sta-

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[153] *Id.*, 19 FCC Rcd at 4980 ¶ 12.

[154] *Id.*, 19 FCC Rcd at 4979 ¶ 9.

[155] *See id.*, 19 FCC Rcd at 4980 ¶ 11.

[156] *See id.*, 19 FCC Rcd at 4980 ¶ 11. We note that Fox has pledged, whenever possible, to air future live entertainment programming with a five-minute delay. *See* Response at 9. While we applaud that change in Fox's practices, it does not excuse the apparent indecency violation in this case.

tion apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency.

107. ***Profanity Analysis.*** The "F-Word" is a vulgar sexual term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. The "F-Word" is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home. Consistent with our decision in the *Golden Globe Awards Order*, we find here that the use of the "F-Word" in the program at issue here apparently violated 18 U.S.C. § 1464's prohibition of the broadcast of "profane" language.[157]

108. In rare contexts, language that is presumptively profane will not be found to be profane where its use is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[158] We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are not present here. Although in this case, the profane language used by Cher may have had some communicative purpose, we do not believe that Fox has demonstrated that the use of such language was essential to informing viewers on a matter of public importance or that editing the language in question would have had a material impact on the network's function as a source of news and information. We note again that Fox or Station WTTG(TV) could have

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[157] *Id.*, 19 FCC Rcd at 4981 ¶¶ 13-14.

[158] *See Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

used a delaying technique to avoid the offending broadcast.

109. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast, the material broadcast is legally actionable.[159]

110. ***No Sanction Proposed.*** In the instant case, we find that the Fox Network affiliate Station WTTG(TV) consciously and deliberately broadcast the program in question. Accordingly, we find that the station's apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful. Thus, we conclude that the Fox affiliate Station WTTG(TV) aired indecent and profane material between 6 a.m. and 10 p.m. in apparent violation of 18 U.S.C. § 1464 and our rules.

111. The gratuitous use of indecent and profane language on a national network broadcast ordinarily would warrant a forfeiture under the standards announced in the *Golden Globe Awards Order.* Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take enforcement action against isolated use of expletives.[160] "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [Fox] and other licensees

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[159] *See ACT III*, 58 F.3d at 660-63

[160] *Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 (citing *Pacifica Foundation*, 2 FCC Rcd at 2699).

that broadcast the program prior to 10 p.m."[161] Accordingly, we find that no forfeiture is warranted in this case.

2. "The 2003 Billboard Music Awards" (December 10, 2003)[162]

112. ***The Programming.*** The Commission received a number of complaints alleging that the Fox Television Network ("Fox" or "Fox Network") aired indecent material during the "Billboard Music Awards" program on December 10, 2003 between 8 and 10 p.m., Eastern Standard Time.[163] The complainants allege that, during the broadcast, Nicole Richie, an award presenter, uttered vulgar expletives in violation of the Commission's rules restricting the broadcast of indecent material.[164]

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[161] *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

[162] FCC File Nos. EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091.

[163] *See* Letter from Lara Mahaney, Parents Television Council to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (December 11, 2003). We also deny an additional complaint from PTC regarding another segment of that same broadcast. *See* Letter from Lara Mahaney, Parents Television Council, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (January 22, 2004) ("*Second PTC Complaint*"). *See* note 195 *infra*.

[164] According to Fox, the Fox affiliate stations located within the Eastern and Central Time Zones broadcast the following exchange between Paris Hilton and Nicole Richie after they walked onstage to present an award:

> Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
> Nicole Richie: Okay, God.
> Paris Hilton: It feels so good to be standing here tonight.
> Nicole Richie: Yeah, instead of standing in mud and cow[blocked].

The complainants request that the Commission levy sanctions against each station licensee that aired the remarks.

113. The Bureau sent Fox a letter of inquiry and attached a transcript of the material in question.[165] Fox responded on January 30, 2004.[166] Fox contends that the aired material is not actionably indecent and does not contain any description or depiction of sexual or excretory organs or activities in a patently offensive manner.[167]

114. ***Indecency Analysis.*** During her appearance on the "Billboard Music Awards," Ms. Richie uttered the "F-Word" and the "S-Word." Fox does not dispute that the "S-Word" refers to excrement.[168] Fox contends, however, that Ms. Richie used the "F-Word" as a mere vulgar expletive to express emphasis, not to depict or

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> Why do they even call it "The Simple Life"? Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.

Fox advises that it edited the tape to remove the expletives before the program aired on tape delay over Fox Stations in the Mountain and Pacific time zones. *See* Letter from John C. Quale, Counsel to Fox Television Stations, Inc., to Investigations and Hearings Division, Enforcement Bureau (Jan. 30, 2004) ("Response") at 3-4, 8.

[165] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc. (January 7, 2004).

[166] *See supra* note 179.

[167] *See* Response at 12-13.

[168] *Id.* at 13. We note, however, that even if Ms. Richie was not literally referring to cow excrement, her use of the "S-Word" would still fall within the subject matter prong of our indecency definition. The "S-Word" has an excretory connotation, however it may be used. Its use invariably invokes a course excretory image in any context.

describe sexual activities.[169] We disagree. Given the core meaning of the "F-Word," any use of that word inherently has a sexual connotation and falls within the first prong of our indecency definition.[170] We conclude that the material at issue clearly describes sexual and excretory activity. The material, therefore, warrants further scrutiny to determine whether or not it is patently offensive as measured by contemporary community standards for the broadcast medium. We conclude, looking at the three principal factors in our contextual analysis, that it is.

115. First, the complained-of material is quite graphic and explicit. The "F-Word" is one of the most vulgar, graphic, and explicit depictions of sexual activity in the English language. Its use invariably invokes a coarse sexual image.[171] Similarly, the "S-Word" is a vulgar, graphic, and explicit depiction of excretory activity. Its use invariably invokes a coarse excretory image. Consequently, we conclude that the broadcast of the "F-Word" and the "S-Word," under the circumstances presented here, is vulgar, graphic and explicit.

116. Second, the fact that use of the words was not sustained or repeated, while relevant, is not dispositive. As the Commission indicated in the *Golden Globe Awards Order*: "[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate

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[169] Response at 13.

[170] *See Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8; *see also Pacifica Foundation*, 56 FCC 2d at 99.

[171] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 9.

a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[172]

117. Third, and most important to our analysis in this context, Ms. Richie's use of the "F-Word" and the "S-Word" here, during a live broadcast of a music awards ceremony when children were expected to be in the audience, was shocking and gratuitous.[173] Indeed, Fox admits that the tone of the material was vulgar.[174]

118. Like the broadcaster discussed the *Golden Globe Awards Order*, Fox was "on notice that an award presenter or recipient might use offensive language during the live broadcast, and it could have taken appropriate steps to ensure that it did not broadcast such language."[175] As the previous case involving Cher demonstrates, Fox had clear notice that celebrities at this program might utter offensive expletives, including the "F-Word" during the broadcast. Moreover, the record of this broadcast shows that Fox, as the producer of the program and the network that carried it to affiliates throughout the country, deliberately sought to push the limits of decency. According to Fox, the original script called for Ms. Richie to make excretory references to "pig crap" and "cow manure," and to substitute the euphemism "freaking" for the "F-Word."[176] Under the circumstances, there was a palpable risk that Ms. Richie would use the "F-Word" and the "S-Word" instead of the euphemisms in the script.

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[172] *Id.*, 19 FCC Rcd 4980 ¶ 12.

[173] *Id.* at 4979 ¶ 9.

[174] *See* Response at 13.

[175] 19 FCC Rcd at 4979 ¶ 10.

[176] Response at 6.

119. Technological advances have made it possible to block the broadcast of offensive words without disproportionately disrupting a speaker's message.[177] Indeed, Fox utilized a five-second delay during the broadcast in question and successfully blocked Ms. Richie's first use of the "S-Word."[178] Fox could have avoided the indecency violation here by delaying the broadcast for a period of time sufficient to ensure that all offending words were blocked.[179] It did not do so. As a result, it broadcast highly offensive material within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.

120. In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here is patently offensive under contemporary community standards for the broadcast medium and thus apparently indecent. By broadcasting this material, the Fox affiliated stations whose broadcasts were the subject of viewer complaints to the Commission apparently violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency.[180]

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[177] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 11.

[178] *See* Response at 8.

[179] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 11. We note that Fox has pledged, whenever possible, to air future live entertainment programming with a five-minute delay. *See* Response at 9. While we applaud that change in Fox's practices, it does not excuse the indecency violation in this case.

[180] PTC also filed a complaint concerning an exchange between musician David Grohl and "Triumph the Insult Comic Dog," a hand puppet, during the same program. *See Second PTC Complaint*. According to a partial transcript attached to the complaint, the exchange focused on whether the puppet would "poop" on various celebrities. The ex-

121. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." In this case, we similarly find that the "F-Word" is a vulgar sexual term and the "S-Word" is a vulgar excretory term, each of which is so grossly offensive to members of the public as to amount to a nuisance and that each word accordingly is presumptively profane. For the reasons stated above, use of the "F-Word" invariably invokes a coarse sexual image and use of the "S-Word" invariably invokes a coarse excretory image. Each of these words is among the most offensive words in the English language, the broadcast of which is likely

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change also included the phrases "kick-ass lip-singer," "sex with a dog," "singers that suck," "a lot of crap," "my ass," and "you suck." The transcript supplied by PTC stated that the references to pooping on someone were "slang for insults." *Id.* Moreover, the word "poop" is more puerile than offensive. The other words and phrases in question are not generally considered to be as graphic, vulgar, and offensive as the "S-Word" or the "F-Word," and most are fairly commonly used in a non-sexual, non-excretory manner. Accordingly, although they may offend some people, we find that, viewed in the context in which they were used, "poop" and the other words and phrases in question were not patently offensive for the broadcast medium. *See, e.g., Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1931, 1938, ¶ 8 (2005) ("*PTC 2*") (in context, fleeting uses of words such as "penis," "dick," "testicle," "vaginal," "ass," "bastard," and "bitch" not indecent). We note, however, that in another context, such as a more graphic and explicit description of sexual or excretory organs or activities, the use of these words might contribute to a finding of indecency. We also conclude that these words were not profane in this context.

to shock the viewer and disturb the peace and quiet of the home.

122. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[181] We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are not present here. Although in this case, profane language may have had some communicative purpose, we do not believe that Fox has demonstrated that it was essential to informing viewers on a matter of public importance or that editing the language in question would have had a material impact on the network's function as a source of news and information.

123. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast, the material broadcast is legally actionable.[182]

124. ***No Sanction Proposed.*** Based upon our review of the record in this case, we conclude that the Fox Network affiliated stations in the Eastern and Central Time Zones whose broadcasts were the subject of viewer complaints to the Commission aired material in violation of 18 U.S.C. § 1464 and our rules. They each broadcast indecent and profane words in an awards show that aired

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[181] *See Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

[182] *See ACT III*, 58 F.3d at 660-63

between 6 a.m. and 10 p.m. and was watched by people of all ages. The licensees of these stations each consciously and deliberately broadcast the program in question. Accordingly, the apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful. The willful broadcast of indecent and profane material on a national network broadcast ordinarily would warrant a forfeiture under the standards announced in the *Golden Globe Awards Order*. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take indecency enforcement action against isolated use of expletives.[183] "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [Fox] and other licensees that broadcast the program prior to 10 p.m."[184] Accordingly, we find that no forfeiture is warranted in this case.

3. "NYPD Blue" (various dates between January 14 and May 6, 2003)[185]

125. The Commission has received complaints alleging that KMBC Hearst-Argyle Television, Inc., licensee

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[183] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 (citing *Pacifica Foundation, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 (1987)). The fact that the statement in question included two expletives is unlikely to have removed it from the former isolated use exception under Commission precedent. The only pre-*Golden Globe Awards Order* decision of which we are aware in which a forfeiture was proposed for a single phrase or statement involved the use of multiple expletives combined with a description of sexual activity. *See LBJS Broadcasting Company*, Notice of Apparent Liability for Forfeiture, 13 FCC Rcd 20956 (1998) (forfeiture paid) (finding broadcast apparently indecent for use of phrase "suck my dick you fucking cunt").

[184] *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

[185] FCC File No. EB-03-IH-0355.

of Station KMBC-TV, Kansas City, Missouri, and other network stations affiliated with The ABC Television Network ("ABC") aired indecent material during several episodes of "NYPD Blue" broadcast between 9:00 and 10:00 p.m. Central Standard Time on various dates between January and May 2003.[186] The complaints allege that, in each of the identified episodes, one or more characters utter expletives in violation of the Commission's rules restricting the broadcast of indecent material. The complaints identify several expletives from the episodes at issue, specifically "dick," "dickhead" and "bullshit."[187]

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[186] Collectively referred to as the "NYPD Blue Expletive Complaints."

[187] The following examples illustrate the typical use of these expletives in the episodes at issue:

1/14/03 episode (Det. Sipowitz in response to his partner's arrest by Internal Affairs): "Alright, this is Bullshit!"

2/4/03 episode (Det. Sipowitz to street officer regarding that officer's partner framing Sipowitz's partner): "Over time - over what - bullshit, a beef!"

2/11/03 episode (Sipowitz speaking to a prisoner who had tried to trick Sipowitz into believing the prisoner was getting transferred to a different prison): "Game's been run dickhead. You ship out tomorrow. Wrong cop."

2/18/03 episode (stated by a suspect who bragged about, but now denies, killing his daughter): "I told people I killed Samia to try and get respect back. She had ashamed me and my community look at me as a fool."
Det. 1: "You took credit for killing your daughter?! Bullshit!"

4/15/03 episode (Det. harassing suspect who had harassed prosecutor): "I'm hoping this bullshit about you trying to get under ADA Haywood's skin is a misunderstanding."

4/8/03 episode (Sipowitz, referring to a wheel-chair bound, uncooperative witness to a murder): "and that dickhead in the wheel chair . . .

126. The terms "dick" and "dickhead" are references to a sexual organ and therefore fall within the first prong of our indecency definition. Similarly, "bullshit," whether used literally or metaphorically, is a vulgar reference to the product of excretory activity and therefore falls within the first prong of our indecency definition. Accordingly, we must proceed to the three-part contextual analysis in our second prong to determine whether the material is patently offensive as measured by contemporary community standards for the broadcast medium. For the reasons stated below, we find "dick" and its derivative, "dickhead," not to be patently offensive in this context, whereas we find "bullshit" to be patently offensive in this context. Regarding the former term, we note that last year we found the same word and its variations not to be indecent in the context presented.[188]

127. First, we find that the terms "dick" and "dickhead," in this context, while understandably offensive to some viewers, are not sufficiently vulgar, explicit, or graphic descriptions of sexual organs or activities to support a finding of patent offensiveness. Second, while not dispositive, it is relevant that none of the programs

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threaten him with perjury and he'll fold."

4/29/03 episode (Det. questioning witness/suspect): "Maybe we should clarify Daly. We drop jail time for good information—not bullshit that wastes our time."

4/29/03 episode (Sipowitz, talking to a suspect who had recruited a youth (who the suspect thought was a minor) to commit a crime): "He's 16 Dickhead! An adult! . . . "

5/6/03 episode (Captain to Det. who harassed suspect in 4/15 episode): "He said you nearly assaulted his client last night."
Det: "Well, that's a bunch of bullshit."

[188] *See PTC 2*, 20 FCC Rcd at 1938, ¶ 8 (finding fleeting use of "dick" and its variations not indecent in context presented).

dwell on these terms. Third, we find that those words, in context, are not sufficiently shocking to support a finding that they are patently offensive. Although the words are undeniably coarse and vulgar, they do not have the same level of offensiveness as the "F-Word" or "S-Word." As we recently stated, "[a]lthough use of such words may, depending on the nature of the broadcast at issue, contribute to a finding of indecency, their use here was not patently offensive."[189] The broadcasts at issue here used these terms in a similar manner.[190] Therefore, under our three-part analysis and based on our precedent, we find the broadcasts of the terms "dick" and its derivative, "dickhead," as used in the "NYPD Blue" episodes at issue, are not patently offensive.

128. However, we do conclude that the broadcasts of a derivative of the "S-Word" at issue here are patently offensive. First, consistent with our analysis of the "F-Word" in the *Golden Globe Awards Order*, we find the "S-Word" to be one of the most vulgar, graphic and explicit descriptions of excretory activity in the English language. Its use invariably invokes a coarse excretory image. We conclude that the broadcast of the "S-Word,"

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[189] *See Complaints Filed By Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1920, 1926 ¶ 8 (2005) ("*PTC 1*"); *PTC 2*, 20 FCC Rcd at 1938 ¶ 8.

[190] *See PTC 1*, 20 FCC Rcd at 1926, ¶ 8 ("A number of complaints cite isolated uses of the word "dick" and variations thereof. In context and as used in the complained of broadcasts, these were epithets intended to denigrate or criticize their subjects. Their use in this context was not sufficiently explicit or graphic and/or sustained to be patently offensive.").

under the circumstances presented here, is vulgar, graphic and explicit.

129. Second, while the word is not dwelled upon, in the *Golden Globe Awards Order*, the Commission reversed precedent that had suggested that the isolated use of an offensive word like the "F-Word" is not indecent.[191] "[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[192] Similarly, we find that the fact that these broadcasts did not dwell on the expletive, though relevant, is not dispositive under the circumstances presented here.

130. Third, the intentional use of a derivative of the "S-Word" on a popular network program broadcast is shocking and gratuitous. In this regard, ABC does not claim that there was any political, scientific or other independent value to using the word here, or any other factor to mitigate its offensiveness. To the extent ABC claims that the word was necessary for dramatic effect, mere dramatic effect does not justify use of patently offensive expletives during time periods when numerous children are likely to be in the audience. Programs utilizing patently offensive expletives for dramatic effect can be aired after 10 p.m.

131. In sum, because the material is explicit and shocking and gratuitous, we conclude that the broadcast of the material at issue here that contained derivatives of the "S-Word" is patently offensive under contemporary community standards for the broadcast medium

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[191] 19 FCC Rcd at 4980 ¶ 12.

[192] *Id.*

and thus apparently indecent. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[193] Therefore, there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable.

132. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." We indicated in that decision that the Commission would analyze other potentially profane words on a case-by-case basis.

133. In this case, we find that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. Like the "F-Word," it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

134. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[194] We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are not present here. Although in this case, the profane language may have

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[193] *See* 47 C.F.R. § 73.3999.

[194] *See Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

had some communicative purpose, we do not believe that ABC has demonstrated that it was essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance. In this respect, this case is unlike *Saving Private Ryan*, where we concluded that deleting offensive words "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." While we recognize that the expletives may have made some contribution to the authentic feel of the program, we believe that purpose could have been fulfilled and all viewpoints expressed without the broadcast of expletives.

135. It is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination under section 73.3999 of the Commission's rules. Because there was a reasonable risk that children may have been in the audience at the time the material at issue was broadcast, the material broadcast is legally actionable.[195]

136. ***No Sanction Proposed.*** In the instant case, we find that the ABC network affiliate Station KMBC-TV consciously and deliberately broadcast the material in question. Accordingly, we find that the apparent violations of 18 U.S.C. § 1464 and section 73.3999 of our rules were willful. The station aired indecent and profane material in violation of our rules because it broadcast indecent and profane words in a show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. The gratuitous use of indecent and profane language on a national network broadcast ordinarily would warrant

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[195] *See ACT III*, 58 F.3d at 660-63.

a forfeiture under the standards announced in the *Golden Globe Awards Order*. Nonetheless, we recognize that our precedent at the time of the broadcast indicated that the Commission would not take indecency enforcement action against the isolated use of expletives.[196] Thus, we will not impose any sanction in this case on the basis of our profanity finding. "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [ABC] and other licensees that broadcast the program prior to 10 p.m."[197] Accordingly, we find that no forfeiture is warranted in this case.

4. "The Early Show" (December 13, 2004)[198]

137. ***The Programming.*** A viewer filed a complaint that CBS Television Network ("CBS") affiliate Station KDKA-TV, Pittsburgh, Pennsylvania, licensed to CBS Broadcasting, Inc., aired a variant of the "S-Word" during the program "The Early Show" on December 13, 2004, at approximately 8:10 a.m., Eastern Standard Time, during a live interview with cast member Twila Tanner of the CBS program "Survivor: Vanuatu." The Bureau requested a tape of the program from CBS, which CBS submitted. The tape shows, and CBS does not dispute, that Ms. Tanner described a fellow contestant of "Survivor: Vanuatu" as a "bullshitter."[199]

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[196] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 (citing *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699).

[197] *Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

[198] FCC File No. EB-05-IH-0007.

[199] In commenting on the strategy employed by the fellow contestant, Ms. Tanner stated: "I knew he was a bullshitter from Day One." The interviewer, Julie Chen, recognized the inappropriateness of the language, stating: "I hope we had the cue ready on that one . . . . We

138. ***Indecency Analysis.*** The Commission determined in the *Golden Globe Awards Order* that the "F-Word" meets the first prong of the indecency test. We stated, "given the core meaning of the "F-Word," any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."[200] Similarly, we now find that the "S-Word," including the variant of that word at issue here, is a vulgar, graphic, and explicit description of excretory material. Its use invariably invokes a coarse excretory image, even when its meaning is not the literal one. Accordingly, we must proceed to analyze whether the material, in context, is patently offensive as measured by contemporary community standards for the broadcast medium. Based on our examination of the three principal factors in our contextual analysis, we conclude that the material is patently offensive.

139. First, the complained-of material is vulgar, graphic, and explicit. Consistent with our analysis of the "F-Word" in the *Golden Globe Awards Order*, we find the "S-Word" to be one of the most vulgar, graphic and explicit words describing excrement or excretory activity in the English language and, for the reasons stated above, its use inherently has an excretory connotation. We conclude that the broadcast of the "S-Word," under the circumstances presented here, is vulgar, graphic and explicit.

140. Second, the fact that the material is not repeated or dwelled upon at length, while relevant, is not dispositive. As the Commission indicated in the *Golden*

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can't say that word . . . . There is a delay."

[200] *Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8.

Globe Awards Order: "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[201] Consequently, non-repetitive broadcasts of the "S-Word" may be found indecent.

141. Third, and most important to our analysis in this specific context, the use of the "S-Word," particularly during a morning news interview, is shocking and gratuitous.[202] Because the interview dealt with the outcome of one of the most popular prime-time shows on broadcast television among children, it is foreseeable that young children not only would be in the audience at that time of day, but also that they would be attentive listeners to the interview with Ms. Tanner. That CBS or the licensee of Station KDKA-TV failed to take measures to protect such viewers from vulgarity in a morning television interview is of particular concern and weighs heavily in our analysis.

142. Viewing the evidence as a whole, while Ms. Tanner's vulgarity is not repeated, the patently offensive nature of the broadcast is clearly established under the first and third principal factors of our contextual analysis. The complained-of material was broadcast within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under section 73.3999 of the Commission's rules.[203] Therefore, there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable.

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[201] *Id.*, 19 FCC Rcd at 4980 ¶12.

[202] *Id.*, 19 FCC Rcd at 4979 ¶9.

[203] *See* 47 C.F.R. § 73.3999.

143. ***Profanity Analysis.*** In the *Golden Globe Awards Order*,, the Commission concluded that the "F-Word" constituted "profane language" within the meaning of 18 U.S.C. §1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." In this case, we similarly find that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. For the reasons stated above, use of the "S-Word" invariably invokes a coarse excretory image. Like the "F-Word," it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.

144. In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[204] We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here. Although in this case, Ms. Tanner's profane language may have had some communicative purpose, we do not believe that it was essential to informing viewers on a matter of public importance or that editing the language would have materially impacted the network's function as a source of news and information.

145. ***No Sanction Proposed.*** We find that CBS Broadcasting, Inc., the licensee of CBS network affiliate Station KDKA-TV, consciously and deliberately broadcast

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[204] *See Saving Private Ryan*, 20 FCC Rcd at 4512-14 ¶¶ 13-18.

the program in question. Accordingly, we find that the apparent violation of 18 U.S.C. § 1464 and section 73.3999 of our rules was willful. Thus based upon our review of the record in this case, we conclude that the licensee of this station aired material in violation of 18 U.S.C. § 1464 and our rules by broadcasting indecent and profane language between 6 a.m. and 10 p.m. during programming watched by a nationwide audience of all ages. The gratuitous use of indecent and profane language during a national broadcast ordinarily would warrant a forfeiture under the standards announced in *Golden Globe Awards Order*. However, we recognize that our precedent at the time of the broadcast did not clearly indicate that the Commission would take enforcement action against an isolated use of the "S-Word."[205] "But for the fact that existing precedent would have permitted this broadcast, it would be appropriate to initiate a forfeiture proceeding against [CBS] and other licensees that broadcast the program prior to 10 p.m."[206] Consequently, we find that no forfeiture is warranted in this case.

C. Broadcasts That Do Not Violate Indecency/ Profanity/Obscenity Restrictions

146. In this section, we conclude that the complained-of programming does not warrant action against the licensee. Although some of this programming is undoubtedly upsetting to some viewers, we reach these determinations either because the programming is not within the scope of our indecency or profanity definitions or because it is not, in the contexts before us, pa-

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[205] *See Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

[206] *Id.*

tently offensive as measured by contemporary community standards for the broadcast medium.

1. "Alias" (January 5, 2005)[207]

147. ***The Programming.*** The Commission received complaints concerning the January 5, 2005 broadcast of the program "Alias" by Allbriton Communications, Inc., licensee of Station WJLA-TV, Washington, D.C., from 9:00 to 11:00 p.m. Eastern Standard Time.[208] The show depicts intelligence agents engaged in various covert operations. In this episode, a male and female character engage in a covert operation on a moving train. The female character having completed her portion of the operation is chased by an assailant. The chase leads to a cargo car and, after a fight with the assailant, the female character finds herself hanging out of the cargo car while the train crosses a high bridge. As the assailant attempts to force the female character off of the moving train, the male character, having been victorious in a separate fight with another assailant, rescues the female character from impending death. The male and female characters hug and stare at each other. In the next scene, which is the subject of the complaints, the male and female characters are in bed kissing, caressing and rubbing against each other. The scene is accompanied by off-camera music. There are no depictions of sexual organs in the scene. Afterwards, the couple lay side-by-side and stare at each other.

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[207] FCC File No. EB-05-IH-0351.

[208] The Commission received two complaints about this program. Neither complaint identified the specific broadcast station on which the program aired. However, we note that the program aired on the ABC Television Network and that both complaints were filed by individuals with addresses within the Washington, D.C. metropolitan area.

148. ***Indecency Analysis***. The episode's references to sexual activities place it within the subject matter scope of our indecency definition. In particular, although there are no depictions of sexual organs, the episode depicts a couple in bed passionately kissing, caressing and rubbing against each other, each of which is a sexual activity. Accordingly, we find that the material meets the first prong of our indecency standard. We now turn to the second prong of our indecency analysis, whether the material is patently offensive by contemporary community standards for the broadcast medium.

149. Turning to the first of the three principal factors in our contextual analysis, the episode does not depict sexual or excretory organs and does not depict sexual activities in a graphic or explicit way. The scene involves no display of sexual organs and contains no sexually graphic language. While viewers see the characters kissing, caressing, and rubbing; it is not clear whether the characters are engaged in sexual intercourse.

150. Regarding the second principal factor of our contextual analysis, while not dispositive, the sexual encounter between the male and female character is not fleeting.[209]

151. With respect to the third principal component of our contextual analysis, we find that the sexual activity is not presented in a pandering, titillating or shocking manner. While the episode shows the male and female characters kissing, caressing, and rubbing in bed, the overall context, including the camera angle, the background music, and the immediately preceding

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[209] Because this scene aired prior to 10 p.m., it falls within the scope of our indecency regulation.

scene, is not shocking in contrast to clear and graphic depictions of sexual intercourse.

152. Accordingly, although the episode depicts sexual activities within the meaning of the Commission's indecency definition, taken as a whole, we conclude that it is not patently offensive as measured by contemporary community standards for the broadcast medium. While the sexual encounter between the two characters is not fleeting, the nature of the encounter is not sufficiently explicit or shocking to be patently offensive. Accordingly, the complaints are denied.

2. "Will and Grace" (November 11, 2004)[210]

153. ***The Programming.*** The Commission received a complaint concerning the November 11, 2004 broadcast of a "Will and Grace" episode titled "Saving Grace Again, Part 1." The episode was broadcast at 8:30 p.m. Central Standard Time over stations affiliated with the NBC Television Network. In the episode, the lead female character, Grace, is in her apartment preparing to go out on her first date after her recent divorce. She is being assisted by her roommate, Will, and is concerned about her appearance. Before leaving, she asks Will if there is "anything else" she should know about dating. Will responds by instructing her to "lean forward" and, as Grace does so, he places his hands on her dress adjusting her breasts upward to enhance her appearance. As Grace is leaving the apartment, she is greeted at the elevator by her friend, Karen, who also knows of the

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[210] FCC File No. EB-05-IH-0049.

date and places her hand on Grace's breasts and appears to also adjust her bosoms upward.[211]

154. ***Indecency Analysis.*** The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs and, therefore, is within the subject matter scope of the Commission's indecency definition. Although the episode contains some sexual innuendo, the characters in the scene in question appear to touch Grace's breast area primarily to enhance her appearance during her date rather than to elicit a sexual response. We need not decide, however, whether the scene depicts or describes sexual activities or organs because even assuming that the first prong of our indecency analysis is met, we conclude that the material is not indecent because it is not patently offensive as measured by contemporary community standards for the broadcast medium.

155. In making this determination, we must look to the full context in which the material is presented. Here, the context is generally humorous and consists of light-hearted ridicule and indirect references to the size of Grace's breasts and the efforts made by her friends to enhance her sexual appeal for her date by making her breasts look larger.

156. Regarding the first component of our contextual analysis, the touching of Grace's breasts is not presented in a graphic or explicit manner. The program contains no nudity and never explicitly shows or specifi-

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[211] The following dialogue occurs:

Karen: "Hey, hey come here, one more thing come here."

Grace: "Will already adjusted them."

Karen: "I wasn't adjusting them."

cally describes sexual activities or organs. We find that the episode does not contain "graphic descriptions of sexual activities and organs or . . . language that is so graphic as to qualify as indecent and profane."[212]

157. With respect to the second component of our contextual analysis, while not dispositive, we find it relevant that the episode does not dwell upon or repeat references to sexual organs or activities.

158. Finally, we do not find that the material at issue is used to pander, titillate, or shock—the third component of our contextual analysis. Rather, the episode addresses the anxiety associated with a first date and Grace's friends' efforts to lend assistance—a topic that is not shocking, pandering, or titillating. Moreover, the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace.

159. In sum, we find that, because of the absence of explicit portrayals of, or references to, sexual organs or activities; the brevity of the scene at issue; and the absence of shocking, pandering, and/or titillating effect, the episode, taken as a whole, is not patently offensive as measured by contemporary community standards for the broadcast medium, and therefore is not indecent. Accordingly, the complaint is denied.

3. "Two and a Half Men" (February 21, 2005)[213]

160. ***The Programming.*** The Commission received a complaint that the February 21, 2005 episode of the CBS

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[212] *NBC Telemundo License Co.*, Memorandum Opinion and Order, 19 FCC Rcd 23025, 23027 ¶ 7 (2004) ("*Coupling MO&O*") (denying complaints about sexual references during the program "Coupling").

[213] FCC File Nos. EB-05-IH-0515, EB-05-IH-0570.

Television Network program "Two and a Half Men" had a scene in which a female doctor "was doing a hernia check" on a male character "with his scrotum in her hand" while he was trying to seduce her.[214] The broadcast occurred between 9 and 10 p.m. Eastern Standard Time. Based on our review of a videotape provided by CBS, the scene in question takes place in a doctor's office and involves a hernia examination, which requires the male character to remove his pants and cough with the female doctor's hand on his scrotum. No nudity or touching, however, is actually depicted, and the examination is not eroticized. During the examination, to which the male character readily agrees because he apparently finds the doctor attractive, he comments suggestively that her hands are warm and asks her out to dinner. She expresses disbelief that he does not remember her and states that they dated while she was in medical school until he broke it off without explanation and began seeing her roommate. The scene ends with him making comments and sounds indicating that she is painfully squeezing his scrotum.

161. ***Indecency Analysis.*** After reviewing a tape of the complained-of scene, we conclude that it is not inde-

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[214] The complainant also generally alleges that "Two and a Half Men" episodes are "raunchy" with "a lot of talk about 'humping.'" In order for us to process an indecency complaint, the complaint must identify a specific broadcast containing allegedly indecent material. We cannot prosecute complaints about programs in general. The First Amendment to the United States Constitution and section 326 of the Act prohibit the Commission from censoring program material and from interfering with broadcasters' freedom of expression. *See* 47 U.S.C. § 326. Moreover, we previously rejected complaints regarding an episode of the program "Will and Grace" that made similar allegations. *See KSAZ MO&O*, 19 FCC Rcd at 16001, ¶6.

cent. Even assuming that the scene that the complainant describes falls within the scope of our indecency definition, it does not, in the context at issue here, satisfy the second prong of our indecency analysis—that is, it is not patently offensive under contemporary standards for the broadcast medium.

162. Looking at the three principal factors that inform our contextual analysis, first, the material is not graphic or explicit. Although the episode suggests that one character is touching another's sexual organs, the apparent touching takes place off-camera; there is never any nudity, depiction of a sexual organ, or description of sexual organs or activities. Rather, viewers are left to surmise what is happening by one character's reactions to another. Turning to the second factor, while not dispositive, it is relevant that the scene at issue is not sustained or repeated. Finally, we do not believe the material shocks, panders, and/or titillates the viewing audience. As noted, actual touching of the male character's sexual organs is not depicted or described. Although the male character makes some mildly suggestive remarks to the doctor during the examination, the exam is not eroticized or presented in a manner that shocks, panders to, or titillates the audience. We conclude, based on our examination of these three factors, that the scene in question is not patently offensive under contemporary standards for the broadcast medium, and therefore is not indecent. Accordingly, we deny the complaint.

4. "Committed" (March 8, 2005)[215]

163. ***The Programming.*** The Commission received a complaint that the March 8, 2005 episode of the NBC

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[215] FCC File No. EB-05-IH-0257.

Television Network program "Committed" had a scene "set in a gymnasium full of children" in which a woman is "grabbing the genitals of a man while he sang the national anthem." The broadcast occurred between 6 a.m. and 10 p.m. Eastern Standard Time. Our review of a videotape of the episode indicates that the episode does not show the woman touching the man's genitals—the touching is only suggested—and the suggested touching is not sexual in nature, but apparently intended by the female character to help the man hit the high notes of the national anthem.

164. ***Indecency Analysis.*** Based on our review of the tape of this episode, we conclude that it is not indecent. Even assuming that the scene the complainant describes is within the scope of our indecency definition, we conclude that it does not satisfy the second prong of our indecency analysis—that is, it is not patently offensive under contemporary standards for the broadcast medium.

165. Looking at the three principal factors that inform our contextual analysis, first, the material is not graphic or explicit. Although the episode suggests that one character is touching another's sexual organs, no touching is ever shown, and there is no nudity, depiction of a sexual organ, or description of sexual activity. Rather, viewers are left to surmise what is happening by one character's reactions to another. Turning to the second factor, while not dispositive, it is relevant that the scene at issue is not sustained or repeated. Finally, we do not believe the material shocks, panders, and/or titillates the viewing audience. Rather, it is not presented in a sexual manner. As noted, the touching is only suggested or implied, and neither the detail nor the tone of

the scene makes it "shocking" or "titillating." We conclude, based on our examination of these three factors, that the program in question is not patently offensive under contemporary standards for the broadcast medium, and therefore is not indecent. Accordingly, we deny the complaint.

5. "Golden Phoenix Hotel & Casino Commercial" (February 19, 2005)[216]

166. ***The Programming.*** The Commission received a complaint concerning a commercial for the Golden Phoenix Hotel and Casino, located in Reno, Nevada, broadcast on February 19, 2005 by Sierra Broadcasting Company ("Sierra"), licensee of Station KRNV(TV), Reno, Nevada. The advertisement features a hotel show entitled "Perfect 10." It begins with ten women in casino show-style costumes suddenly jumping onto the bed of a fully clothed man who has been reading "Perfect 10" magazine, then features excerpts of singing and dancing from the show mixed with graphics, and ends with a brief view of the man alone on the bed with his partially bare upper torso and face covered by lipstick kisses. The voice-over describes the concept and content of the show and its male star (who is not the man in bed) and identifies the hotel. The complainant describes the bed scenes as "a mostly naked man laying in bed with . . . almost completely naked women exposing their breasts and other body parts [and] acting in a truly obscene and sexual manner." The complainant alleges that the commercial is obscene and briefly enumerates the criteria for that finding.

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[216] FCC File No. EB-05-IH-0314.

167. ***Obscenity Analysis.*** We do not find the complained-of material obscene. Although the material does suggest sexual activity, the mere suggestion of such activity does not render material obscene. Obscene material, which is not protected by the First Amendment and may not be broadcast at any time, is defined by a three-prong test set forth by the Supreme Court in *Miller v. California*: (1) the average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value.[217] All three prongs of this test must be met before the material may be found to be obscene. This test is designed "to isolate 'hard core' pornography from expression protected by the First Amendment."[218] Based on our review, the advertisement at issue clearly does not constitute the type of "hard core pornography" covered by *Miller*.

168. ***Indecency Analysis.*** The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs and, therefore, is within the subject matter scope of the Commission's indecency definition. Even assuming that the advertisement's suggestion of sexual activity meets the first prong of our indecency analysis, however, we conclude that it is not indecent because it is not patently offensive as measured by contemporary community standards for the broadcast medium.

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[217] 413 U.S. at 24.

[218] *Id.* at 29.

169. Turning to the first principal factor in our contextual analysis, we find that the material at issue is neither explicit nor graphic. In the first bed scene, the man is shown fully clothed on top of the bed, and the women's costumes, though sexually suggestive, do not actually display their sexual organs. Likewise, the women put their arms around the man in a manner that is suggestive rather than explicit or graphic. The second bed scene merely shows the man alone from the waist up, with his shirt unbuttoned and lipstick marks on his face, without depicting sexual activity or organs.

170. Concerning the second principal factor of our contextual analysis, the material at issue is repeated or dwelled upon in the sense that there are two bed scenes, one at the beginning of the advertisement and one at the end. Note, however, that this factor is not dispositive. "No single factor generally provides the basis for an indecency finding."[219]

171. Finally, with respect to the third factor of our contextual analysis, it does not appear that the bed scenes at issue shock, pander to, or titillate the viewing audience. No sexual acts or organs are shown. Among other things, no sexual acts or organs are shown, the voice-over is not explicitly sexual, and the camera angles do not present the material in a pandering manner.

172. Viewing the advertisement as a whole, we conclude that it is not patently offensive. Although the bed scenes are repeated, this factor is outweighed, in this particular context, by the absence of any graphic or explicit portrayal of sexual activities or organs and our finding that it is not shocking, pandering to, or titillat-

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[219] *Indecency Policy Statement*, 16 FCC Rcd at at 8003 ¶ 10.

ing. Therefore, we conclude that the advertisement is not indecent, and the complaint is denied.

6. "The Oprah Winfrey Show" (March 18, 2004)[220]

173. ***The Programming***: The Commission received numerous complaints about the discussion of teenage sexual practices contained in the March 18, 2004 episode of the syndicated television program "The Oprah Winfrey Show." This particular episode included an examination by the host and her guests and audience of serious parental/supervisory issues including the complained-of discussion arising from the movie "Thirteen." The complaints cite the following discussion, which we verified from an official transcript of the program:

> WINFREY: Yeah. So you say—let's talk about that secret language, Michelle.
>
> Ms. BURFORD: Yes.
>
> WINFREY: I didn't know any of this.
>
> Ms. BURFORD: I have—yeah, I have—I've gotten a whole new vocabulary, let me tell you.
>
> WINFREY: I did not know any of this. Does this—does this mean I am no longer hip?
>
> Ms. BURFORD: Salad-tossing. I'm thinking cucumbers, lettuce, tomatoes. OK? I am definitely not hip.
>
> WINFREY: OK—so—OK, so what is a salad toss?

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[220] FCC File No. EB-04-IH-0081.

Ms. BURFORD: OK, a tossed salad is—get ready; hold on to your underwear for this one—oral anal sex. So oral sex to the anus is what tossed salad is. Hi, Mom. OK. A rainbow party is an oral sex party. It's a gathering where oral sex is performed. And a—rainbow comes from—all of the girls put on lipstick and each one puts her mouth around the penis of the gentleman or gentlemen who are there to receive favors and makes a mark in a different place on the penis, hence the term rainbow. So . . .

WINFREY: OK. And so what does pre—so what does pretty boy mean? A pretty boy.

Ms. BURFORD: Pretty boy is a sexually active boy, someone who's been fairly promiscuous. So it isn't maybe what you would have thought pretty boy meant in your time.

WINFREY: And dirty means what? Does dirty mean . . .

Ms. BURFORD: Dirty means a diseased—means a diseased girl. And along with that the term that some teens are using to mean HIV is High Five, 'high' and then the Roman numeral 'V.' High Five. So if you got High-Fived by Jack, you got diseased by Jack. You got—you got HIV.

WINFREY: It means he gave you HIV.

Ms. BURFORD: He gave you HIV. Yeah.

WINREY: Yeah. OK. And boo—booty call is pretty common, right?

Ms. BURFORD: Yeah, that's—yeah, that's pretty pervasive. Yeah, that's an early morning or late-at-night call for sex that involves no real relationship. Maybe 2 AM, guy calls girl, and says, 'Meet me at so and so location, we have sex, we leave,' booty call. You all got that?

174. ***Indecency Analysis.*** There can be no question that the complained-of dialogue describes sexual activities, and therefore falls within the subject-matter scope of our indecency analysis. We thus turn to the second prong of our indecency analysis—a determination of whether the material at issue was patently offensive as measured by contemporary community standards for the broadcast medium.

175. Turning to the first factor in our contextual analysis, the broadcast here clearly describes sexual practices in very specific terms, and is highly graphic and explicit.

176. With respect to the second factor, the dialogue is not brief, but continues at length.[221] Indeed, the title of the segment is "The Secret Language of Teens," and the discussion of these terms for sexual activity is the subject of the entire segment.

177. Given this particular context, though, our findings with regard to the first two factors of our analysis are outweighed by our conclusion under the third factor of our contextual analysis that the complained-of mate-

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[221] *Indecency Policy Statement*, 16 FCC Rcd at 8008, ¶ 17 (stating that "[r]epetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts").

rial, in context, is not pandering and is not used to titillate or shock.

178. The program segment focuses on the "secret lives" of many teenagers. Through guests—parents, teenagers, and others—serious discussions take place about the disturbing, secret teenage behavior portrayed in the movie "Thirteen." Guests speak of serious, potentially harmful behaviors of teens—such as drug use, drinking, self-mutilation, and sexual activity, how teenagers hide those behaviors from their parents, and how parents might recognize and address those behaviors with their teens. The material is not presented in a vulgar manner and is not used to pander to or titillate the audience. Rather, it is designed to inform viewers about an important topic. To the extent that the material is shocking, it is due to the existence of such practices among teenagers rather than the vulgarity or explicitness of the sexual depictions or descriptions. It would have been difficult to educate parents regarding teenagers' sexual activities without at least briefly describing those activities and alerting parents to the little-known terms (*i.e.*, "salad tossing," "rainbow party") that many teenagers use to refer to them.[222] For many of the same reasons, we have previously denied complaints about similar educational broadcasts.[223]

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[222] *See Saving Private Ryan*, 20 FCC Rcd at 4513 ¶ 14 (noting that "[i]n short, the vulgar language here was not gratuitous and could not have been deleted without materially altering the broadcast").

[223] *See King Broadcasting Co. (KING-TV)*, Memorandum Opinion and Order, 5 FCC Rcd 2971, ¶ 13 (1990) (finding that although a program dealt explicitly with teenage sexual issues and included very graphic sex organ models, "the material presented was clinical or instrumental in nature and not presented in a pandering, titillating or vulgar manner"); *see also Indecency Policy Statement*, 16 FCC Rcd at 8011-12

179. As we have previously stated, "the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding."[224] Here, in light of the overall context of the broadcast, we find that the complained-of material is not patently offensive as measured by contemporary community standards for the broadcast medium, and, therefore, not indecent.

7. Political Advertisement (October 14, 2004)[225]

180. ***The Programming.*** The Commission received a complaint regarding a political advertisement that was aired by Multimedia KDSK, Inc., licensee of Stations KDSK-TV and KDNL-TV, St. Louis, Missouri, between 5:00 and 7:00 p.m. on October 14 and 15, 2004. The advertisement, sponsored by the Illinois Democratic Party and the Maag for Justice political campaign, was aired during the Illinois judicial election cycle. The complainant alleges—and our review of photographic stills from the advertisement confirms—that the spot included references to rape and sodomy in criticizing the competence of another candidate in the race for a seat on the Supreme Court of Illinois.[226] The complainant argues

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¶ 21 (citing to staff decisions in which episodes of the "Oprah Winfrey Show" and "Geraldo Rivera Show" were found not indecent).

[224] *Id.*, 16 FCC Rcd at 8010 ¶ 20.

[225] FCC File No. EB-05-IH-0223.

[226] The photographic stills and text of the advertisement can be found at http://www.brennancenter.org/programs/downloads/buying time_2004/STSUPCT_IL_DPIL_KARMEIER_CHILDREN.pdf. The ad begins with a picture of a schoolyard through a chain-link fence, then shows a blurred image of a home, then superimposes a copy of the judicial decision over the home, then adds a picture of Judge Karmeier,

that this advertisement contains prurient speech, falls outside the First Amendment protections of the Constitution of the United States, and should not have aired at a time when children were watching television.

181. ***Obscenity Analysis.*** Although the complainant does not explicitly claim that the advertisement is obscene, we read his allegation that the spot contains prurient speech and is without First Amendment protection as an allegation that it is obscene. We find, however, that the complained-of material is not obscene. Although the material does refer to sexual activity, the mere mention of such activity does not render material obscene.[227] Obscene material, which is not protected by the First Amendment and may not be broadcast at any time, is defined by a three-prong test set forth by the Supreme Court in *Miller v. California*: (1) the average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a

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and concludes with a picture of a jail cell, with Judge Karmeier's picture superimposed upon it. The narrator states:

> He used candy to lure the children into the house. Once inside, the three children were sexually molested. A four-year old girl raped. Her brothers-sodomized. A Belleville man was arrested and convicted for the crime after trying to develop pictures of the abuse. Despite prosecutor's objections, Judge Lloyd Karmeier gave him probation, saying "The court should grant leniency . . . " Another case where Karmeier let a violent criminal out into the community. Lloyd Karmeier—the wrong choice for Supreme Court. Paid for by the Democratic Party of Illinois.

[227] *See WGBH Educational Foundation, Memorandum Opinion and Order*, 69 FCC 2d 1250, 1253-54 (1978) ("*WGBH MO&O*") (finding that offensive language, including expletives, does not fit within the established definition of obscenity).

patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value.[228] This test is designed "to isolate 'hard core' pornography from expression protected by the First Amendment."[229] All three prongs of this test must be met before the material may be found to be obscene.

182. The material at issue here is not obscene because it does not meet the three-part definition articulated in *Miller v. California*. Although the advertisement discusses a criminal sexual assault, it is a political ad in a hotly contested judicial election and therefore, taken as a whole, it is not without serious political value. Because the material does not meet the third prong of the *Miller* definition, it is not obscene and it is not necessary to consider the other two prongs of the definition.[230]

183. ***Indecency Analysis.*** Turning to our indecency analysis, we find that the complained-of material describes sexual activity by referencing rape and sodomy, thereby satisfying the first prong of our indecency analysis. We next turn to the second prong of our indecency analysis—a determination of whether the material at

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[228] 413 U.S. at 24.

[229] *Id.* at 29.

[230] *Id.* at 23-24. *See Roth*, 354 U.S. 476; *but see Petition for Declaratory Ruling Concerning Section 312(A)(7) of the Communications Act*, Declaratory Ruling, 9 FCC Rcd. 7638 (1994), *reversed on other grounds sub nom Becker v. FCC*, 95 F.3d 75 (1996) (finding that campaign advertisements containing graphic abortion imagery were, in context, part of important political debate and thus were not indecent) ("*1994 Declaratory Ruling*").

issue was patently offensive as measured by contemporary community standards for the broadcast medium.

184. After reviewing the material, we find that the advertisement is not explicit or graphic, the first factor we must consider in our contextual analysis to determine whether material is patently offensive. The advertisement references rape and sodomy of children without supplying any detailed description or depiction. These references are significantly less graphic than other instances where political advertisements were considered "graphic" but not indecent.[231]

185. Next, we examine the second factor in our contextual analysis: whether the material is repeated or dwelled upon. We find that rape and sodomy are each referenced only once in the advertisement, which therefore does not repeat or dwell upon these subject areas. After citing these criminal acts, the advertisement moves on to discuss the sentence delivered to the perpetrator by one of the judicial candidates.

186. Finally, we assess whether the material is used in a pandering, shocking or titillating manner. The advertisement calls attention primarily to the judgment of a judicial candidate, and mentions predatory sexual activities to call into question the candidate's judgment in sentencing a criminal. We do not consider such references pandering or titillating. While references to rape and sodomy are shocking, particularly when they involve children, we find that, on balance, the advertisement advocates against a particular judicial candidate rather

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[231] *Id.* at 7643 (depicting dead or aborted and bloodied fetuses in campaign advertisements was graphic, but not indecent).

than shocks, panders to, or titillates the audience.[232] In other words, to the extent that the material has "shock" value, it is not related to sexual or excretory activity but to the judge's allegedly "soft attitude" on crime.

187. In this case, we find that all three of the principal factors in our contextual analysis weigh in favor of a finding that the complained-of material is not patently offensive as measured by contemporary community standards for the broadcast medium. While the references in this political advertisement to rape and sodomy were understandably upsetting to some viewers, subject matter alone does not render material indecent.[233] Therefore, we conclude that this advertisement is not indecent. Accordingly, we deny the complaint.[234]

8. "The Amazing Race 6" (December 21, 2004)[235]

188. ***The Programming.*** "The Amazing Race 6" is a CBS Television Network ("CBS") program in which two-person teams race around the world for a cash prize. The Commission received a complaint regarding the December 21, 2004 broadcast of the program by CBS affiliate Station KYW-TV, Philadelphia, Pennsylvania, licensed to CBS Broadcasting, Inc. According to the complaint, "[m]idway through that episode, my nine-year-old daughter asked me what was written on the side of a bus that the contestants were embarking upon.

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[232] *Id.*

[233] *See Indecency Policy Statement*, 16 FCC Rcd at 8011 ¶ 21.

[234] Because we find that the advertisement is not indecent, we need not decide whether the Commission may propose forfeitures against licensees that broadcast indecent political advertisements outside of the safe harbor. *See generally Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996).

[235] FCC File No. EB-05-IH-0394.

She stated that she thought that was a bad word that she was not supposed to say. Sure enough, the words 'FU** COPS' was [sic] visible on the side of the bus near the door where the contestants are getting on the bus."

189. The Bureau obtained a videotape of the subject episode from CBS which confirms that, during a scene in which two of the contestants leave a train, the camera shot briefly includes some graffiti stating "Fuck Cops!" The graffiti is spray-painted in small white letters on the train's side.

190. ***Indecency Analysis.*** We held in the *Golden Globe Awards Order* that, given the core meaning of the "F-Word," any use of that word inherently has a sexual connotation and falls within the first prong of our indecency definition.[236] The complained-of material here is language that we have found inherently describes sexual activity. The material, therefore, warrants further scrutiny to determine whether it was patently offensive as measured by contemporary community standards for the broadcast medium.

191. Looking at the three principal factors that comprise our contextual analysis, we note first that, although the "F-Word" is depicted in the program, the image is not graphic or explicit. The graffiti is small, out of focus, and difficult to read. Unless one is looking directly at or for the words, the average viewer would not even notice the graffiti. Second, while not dispositive, it is relevant that the material is not repeated or dwelled upon. Indeed, the image is displayed only momentarily. Finally, the shot of the graffiti is not shocking, pander-

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[236] *See Golden Globe Awards Order*, 19 FCC Rcd at 4978 ¶ 8; *see also Pacifica Foundation*, 56 FCC 2d at 99.

ing, or titillating because it is barely visible. Indeed, the average viewer would not have noticed the graffiti. Since each of the three factors examined above weighs against a finding of patent offensiveness, we conclude that the material is not patently offensive and therefore not indecent.

192. ***Profanity Analysis.*** In the *Golden Globe Awards Order*, we found that the "F-Word" constituted profane language within the meaning of 18 U.S.C. § 1464 because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[237] Based upon our review of the record in this case, however, we conclude that CBS did not air profane material in violation of 18 U.S.C. § 1464. As we have indicated elsewhere in this Order, we believe that the "F-Word" is presumptively profane because it is so grossly offensive as to constitute a nuisance.[238] This, however, is one of the rare instances in which this presumption is effectively rebutted. Unlike the broadcast spoken utterance of the "F-Word" at issue in the *Golden Globes Award Order*, the written version of the word during this broadcast, for the reasons mentioned above, would not have been noticed by the average viewer. As such, we find it impossible to conclude that its broadcast was "likely to shock the viewer and disturb the piece and quiet of the home"[239] and thus amount to a nuisance. For all of these reasons, we find that the broadcast is not profane, and the complaint is denied.

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[237] *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶¶ 13-14.

[238] *Id.* at 19 FCC Rcd at 4980 ¶ 12 (citing *Tallman v. United States*, 465 F.2d 282, 285 (7th Cir. 1972)).

[239] *See supra* ¶ 19.

9. Various Programs Containing Expletives (various dates between August 31, 2004 and February 28, 2005)

193. ***The Programming.*** The Commission has before it twenty complaints concerning programming that contains the following allegedly obscene, indecent, or profane words and phrases: "hell," "damn," "bitch," "pissed off," "up yours," "ass," "for Christ's sake," "kiss my ass," "fire his ass," "ass is huge," and "wiping his ass." We conclude that, while these words and phrases are understandably upsetting to some viewers, in the contexts used here, they are neither obscene, indecent, nor profane. The complaints include:

(a) an October 19, 2004, complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged October 18, 2004 broadcast of "The Simpsons" program, in which the phrases "up yours," and "hell" were allegedly aired between 7:00 and 7:30 p.m. The complainant believes that the material was "obscene."[240]

(b) a November 4, 2004 complaint against TVT License, Inc., licensee of Station WTVT(TV), Tampa, Florida, for a November 4, 2004 broadcast of the "North Shore" program, in which the words "bitch" and "hell" were allegedly broadcast during an unspecified time period. The complainant believes that the material was "profane."[241]

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[240] FCC File No. EB-05-IH-0316.

[241] FCC File No. EB-05-IH-0317.

(c) a November 18, 2004 complaint against KTVI License, Inc., licensee of Station KTVI(TV), St. Louis, Missouri, for its alleged October 26, 2004 broadcast of the "Father of the Pride" program, in which the phrases "damn," "hell," and "my ass is huge," were allegedly aired at approximately 8:00 p.m.[242] The complainant believes that the material "lacks serious literary, artistic, political or scientific value and meets the standard of the prohibition issued by the FCC."

(d) a September 22, 2004 complaint against Meredith Corporation, licensee of Station WSMV-TV, Nashville, Tennessee, for its alleged August 31, 2004 broadcast of the "Father of the Pride" program, in which the phrases "bitch" and "slutty sister" were used and "an animal trainer was accosted by a sexually aroused chimpanzee."[243] The complainant further alleges that a sexual double-entendre was made through the animated lion character's statement "'Big Daddy's ready for lovin' . . . it may be nine o'clock in New York, but right here it's mountin' time.'" The complainant alleges that the material is indecent.

(e) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged October 25, 2004 broadcast of the "Girlfriends" program, in which the word "ass" was allegedly aired during

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[242] FCC File No. EB-05-IH-0385.

[243] FCC File No. EB-04-IH-0459.

the 9:00 to 9:30 p.m. time period.[244] The complainant believes that the material was "offensive."

(f) an undated complaint against an unspecified UPN affiliate for its alleged November 29, 2004 broadcast of the "Half and Half" program in which the word "damn" was allegedly aired during the 9:00 to 9:30 p.m. time period.[245] The complainant believes that the material was "profane."

(g) a December 20, 2004 complaint against an unspecified UPN affiliate for its alleged December 20, 2004 broadcast of the "Second Time Around" program in which the phrases "get your ass out here," "I gave you the damn keys," and "damn flashlight" were allegedly aired at approximately 9:50 p.m.[246] The complainant believes that the material was both "profane" and "obscene."

(h) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged December 1, 2004 broadcast of the "America's Next Top Model" program in which the words "ass" and "bitch" were allegedly aired during the 8:00 to 9:00 p.m. time period.[247] The complainant believes that the material was "profane."

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[244] FCC File No. EB-05-IH-0318.

[245] FCC File No. EB-05-IH-0421.

[246] FCC File No. EB-05-IH-0428.

[247] FCC File No. EB-05-IH-0420.

(i) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged December 21, 2004 broadcast of the "Family Matters" program in which the word "hell" was allegedly aired during the 10:30 and 11:00 a.m. time period.[248] The complainant believes that the material was both "obscene" and "profane."

(j) an undated complaint against Viacom International, Inc., licensee of Station WTOG(TV), St. Petersburg, Florida, for its alleged broadcast of the "Cuts" program on February 28, 2005 during which the words "ass" and "damn" were allegedly aired during the 8:30 to 9:00 p.m. time period.[249] The complainant believes that the material was "inappropriate."

(k) an undated complaint against McGraw-Hill Broadcasting Company, Inc., licensee of Station KMGH-TV, Denver, Colorado, for its alleged broadcast of an unspecified program on January 25, 2005 during which the phrases "my Mom's been wiping his ass," "he said his parents wo uld fire her ass," and "a pissed-off exemployee" were allegedly aired during the 9:00 to 10:00 p.m. period.[250] The complainant believes that the material was "obscene," "indecent" and "profane."

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[248] FCC File No. EB-04-IH-0422.

[249] FCC File No. EB-05-IH-0423.

[250] FCC File No. EB-05-IH-0696.

(l) an April 23, 2005 complaint against TVT License, Inc., licensee of Station WTVT(TV), Tampa, Florida, for a December 9, 2004 broadcast of the "North Shore" program, in which the words 'ass" and "hell" were allegedly broadcast between 9 and 10 p.m.. The complainant believes that the material was indecent.[251]

194. ***Obscenity Analysis.*** We deny the complaints to the extent that they allege the foregoing broadcasts are obscene.[252] The three-part obscenity test set forth in *Miller v. California* requires that (1) an average person, applying contemporary community standards, would find that the material, as a whole, appeals to the prurient interest; (2) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.[253] This test is designed "to isolate 'hard core' pornography from expression protected by the First Amendment."[254] Nothing in the record indicates that the foregoing broadcasts depict the kind of "hard core pornography" covered by *Miller*, or that, *as a whole*, they

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[251] FCC File No. EB-05-IH-0417.

[252] The allegations of obscenity concern, specifically, the phrases "up yours," "hell," "get your ass out here," "I gave you the damn keys," "I was holding the damn flashlight," "my Mom's been wiping his ass," "kiss my ass," "his parents would fire his ass," and "either that or a pissed-off ex-employee."

[253] 413 U.S. at 24.

[254] *Id.* at 29.

appeal to the prurient interest or lack serious literary, artistic, political, or scientific value.[255]

195. ***Indecency Analysis.*** Although only three complaints explicitly allege that the cited material is indecent,[256] we will perform our indecency analysis on all the allegations about offensive language. Several of the complaints cite similar terms without providing any context. For example, complainants challenge uses of the words "up yours," "ass," "hell," "damn," and "bitch."[257] One complaint, about Station WSMV-TV's August 31, 2004 broadcast of an episode of "Father of the Pride," concerns references to an animated character's sister being "slutty," and to various sexual acts, including animal sex and bestiality.[258] Another complaint, against Station KMGH-TV, concerns the phrases "my Mom's been wiping his ass," and "he said his parents would fire her ass," and "either that or a pissed-off ex-employee."[259]

196. The words "hell," "bitch," "slutty," and "damn" do not refer to sexual or excretory organs or activity and therefore fall outside the subject matter scope of our indecency rules. We will assume *arguendo* that the remaining allegations describe or depict sexual or excretory organs or activities and therefore fall within the subject matter scope of our indecency rules. Specifically, the word "ass," and the phrases "wiping his ass"

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[255] *See WGBH MO&O*, 69 FCC 2d at 1253-54 (finding that offensive language, including expletives, does not fit within the established definition of obscenity).

[256] *See supra* ¶ 193(c), (e), and (j).

[257] *See supra* ¶ 193(a)-(c), (e)-(j), (l).

[258] *See supra* ¶ 193(d).

[259] *See supra* ¶ 193(k).

and "fire her ass," in the context of the programs, refer to the buttocks, which are sexual and excretory organs.[260] Likewise, the term "pissed off" is a derivative of "piss," which refers to the act of urination. Moreover, the references to sexual acts, including animal sex and bestiality, describe sexual activity. Although the phrase "up yours" is more vague, the speaker arguably is referring to a sexual or excretory organ of the listener. Thus, we must proceed to determine whether these terms or references are patently offensive as measured by contemporary community standards for the broadcast medium under the second step of our indecency analysis.

197. We find that, although the complained-of word "ass," and the phrases "up yours," "my ass is huge," "wiping his ass," "fire her ass, and "pissed off" are coarse expressions, in the context presented, they are not sufficiently vulgar, graphic, or explicit to support a finding of patent offensiveness. To the extent the complaints describe the context in which the word "ass" is used, it is used in a nonsexual sense to denigrate or insult the speaker or another character. The word "piss" is used as part of a slang expression that means "angry." The word "ass" and the phrase "pissed off" do not invariably invoke coarse sexual or excretory images, and in the context presented they do not rise to the level of offensiveness of the "F-Word" or "S-Word." Moreover, while not dispositive, none of these complaints suggest that the remarks are repeated or dwelled upon. Although the phrases may have a marginally shocking effect, that impact is not so marked as to convince us that the overall context of the broadcast was indecent. Moreover, we note that last year we found that the fleeting use of

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[260] *See supra* note 97.

some of these same terms was not indecent in the contexts presented.[261] The manner in which these terms are used in the complained-of broadcasts resembles that presented in our previous decisions. Therefore, based on our precedent, the complained-of broadcasts are not indecent.

198. With regard to the remaining allegations in the complaint against the August 31, 2004 episode of "Father of the Pride," we find that the material is not indecent. First, the animated lion character's utterance of the phrase "it's mountin' time," although apparently used as a sexual reference, is not, in the context of the instant broadcast, sufficiently explicit or graphic to be deemed patently offensive. While the animated imagery accompanying the lion character's comment does portray him making a circular pelvic motion while uttering the phrase "mountin' time," it does not contain any depiction of sexual organs or explicit sexual acts. Moreover, the sexual reference is neither repeated nor dwelled upon, and is not shocking, pandering, or titillating. Similarly, we find no merit to the allegation that the material visually depicting "an animal trainer [being] accosted by a sexually aroused chimpanzee" is indecent. Contrary to the complainant's allegation of portrayed bestiality, the scene in question depicts the effect

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[261] *See PTC 1*, 20 FCC Rcd at 1926, ¶ 8 (finding that, in context, fleeting uses of words including "bitch" and "ass" not sufficiently explicit or graphic to support a finding of patent offensiveness); *PTC 2*, 20 FCC Rcd at 1938 ¶ 8 (finding that, in context, words including "hell," "damn," "pissed," "bitch," not sufficiently explicit or graphic to support a finding of patent offensiveness). We note that, in contrast, in *Golden Globe Awards*, 19 FCC Rcd at 4979 ¶ 9, we found that a single use of the "F-Word" during the live broadcast of an awards ceremony was explicit and graphic because "its use invariably invokes a coarse sexual image."

of a trainer's application of animal pheromones, apparently arousing a chimpanzee to attempt to caress and nuzzle him. It does not contain any depiction of sexual organs or sexually explicit acts and is not titillating or shocking. Consequently, we find that the foregoing material, while offensive to some viewers, is not patently offensive under our indecency standard.

199. ***Profanity Analysis.*** Several of the complaints allege that the use of the words "bitch," "hell" or "damn," or phrases including their variants, are profane. These words are not sexual or excretory terms, and thus are presumed not to be profane.[262] On the other hand, the words "ass" and "piss" and their derivatives do describe sexual or excretory activities. As noted above, we discussed these terms in two decisions last year, finding that neither was not sufficiently graphic or explicit in context to be indecent,[263] and further holding that the term "pissed" was not profane in the context presented.[264] Similarly, we conclude that the use of these terms here in context is not so grossly offensive to members of the public as to amount to a nuisance and thus be deemed profane. Accordingly, we deny the complaints.

10. "Family Guy" (January 16, 2005)[265]

200. ***The Programming.*** The Commission received a complaint concerning the January 16, 2005 broadcast of

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[262] *See supra* ¶ 18.

[263] *See PTC 1*, 20 FCC Rcd at 1926, ¶ 8 (finding that use of the term "ass" was not indecent in context); *PTC 2*, 20 FCC Rcd 1938, ¶ 8 (finding that broadcast references to "hell," "damn," "bitch," and "pissed" were not indecent).

[264] *Id.* (finding that several words, including "pissed," were not profane in context).

[265] FCC File No. EB-05-IH-0084.

"Family Guy" over Fox Television Network-affiliated stations, and specifically Station WTTG-TV, Washington, D.C., at 9:00 p.m. Eastern Standard Time. The episode in question, titled "And The Weiner Is . . . . ," includes dialogue in which cartoon characters say "penis," along with euphemisms for the male sex organ, within the episode's subject: a father's concern that he is not as well-endowed as his son.

201. ***Indecency Analysis***. The episode's references to "penis" clearly places it within the subject matter scope of our indecency definition as the word "penis" refers to a sexual organ.[266] We thus turn to the second prong of our indecency analysis—whether the material at issue was patently offensive as measured by contemporary community standards for the broadcast medium. In making this determination, we must look to the full context in which the material is presented, including the explicit or graphic nature of the description, whether it dwells on or repeats at length descriptions of sexual organs or activities, and whether it appears to pander or is used to titillate or shock. While the program's cartoon format may make it more attractive to younger viewers, the context is generally a humorous series of scenes of increasingly desperate behavior by the cartoon family father as he tries to compensate for his self-perceived inadequacies after learning that his son's penis is larger than his own.

202. Regarding the first component of our contextual analysis, the program contains no nudity and never actually shows or graphically describes any sexual organ.

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[266] *Young Broadcasting NAL*, 19 FCC Rcd at 1754 ¶ 9 (finding that broadcast material that showed a male performer's genitalia satisfied the subject matter prong of the indecency analysis).

The episode merely refers to the cartoon son's penis and shows the cartoon father's and mother's reactions upon learning of it. Moreover, the specific euphemisms that are employed, such as "wang" and "little banana," are relatively inoffensive. In a similar case, the Commission found that several episodes of the program "Coupling" were not sufficiently vulgar, explicit, or graphic to qualify as indecent, even though they repeatedly referred to sexual activities and organs.[267] The Commission concluded that although the episodes included "sustained and repeated use of sexual innuendo and double entendre . . . none of the episodes contain[ed] graphic descriptions of sexual activities and organs or use[d] language that is so graphic as to qualify as indecent and profane."[268]

203. Regarding the second component of our contextual analysis, the episode does dwell upon and repeat various references to penises. As we have noted previously, however, no single factor in our indecency analysis is generally dispositive.[269]

204. Finally, we do not find that the material is used to pander, titillate, or shock. Rather, the episode at issue addresses the father's feelings of inferiority, and the topic is presented in an indirect, humorous manner, without the use of graphic or explicit details.

205. In sum, although the word "penis" and euphemisms for that word are repeated several times in the episode, we find that because of the absence of explicit or graphic descriptions or depictions of any sexual or-

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[267] *See Coupling MO&O*, 19 FCC Rcd at 23027 ¶ 7.

[268] *Id.*

[269] *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10.

gan, along with the absence of shocking, pandering, and/or titillating effect, the episode, taken as a whole, is not patently offensive as measured by contemporary community standards for the broadcast medium and is therefore not indecent. Accordingly, the complaint is denied.

11. "The Academy Awards" (February 27, 2005)[270]

206. ***The Programming.*** The Commission received several complaints against the ABC Television Network's broadcast of "The Academy Awards" program, alleging that show host Chris Rock uttered vulgar and offensive comments including "sit their asses down," and the statement that the "Superman" film "sucked." One complainant further alleges that the program featured a video montage in which a male actor was "naked from the waist up, standing in the background, [while a female actor] was apparently eating a sausage or other item, but it appeared to be superimposed and gave the appearance of her performing oral sex on the man." The segments in question were all broadcast during the evening of February 27, 2005 before 10 p.m. Eastern Standard Time.

207. ***Indecency Analysis.*** With respect to the first prong of the indecency analysis, we find that the broadcast falls within the scope of the indecency definition.[271] We will assume *arguendo* that, in certain contexts, the term "sucked" may refer to oral sex. The phrase "sit their asses down" refers to the buttocks, which are sexual and excretory organs. Similarly, the video clip described in the complaint uses video images to allude to

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[270] FCC File No. EB-05-IH-0277.

[271] *See supra* ¶ 12.

oral sex, a sexual activity, and thus is within the scope of our indecency definition. We therefore evaluate whether the foregoing material is "patently offensive" as measured by the contemporary community standards for the broadcast medium under the second step of our indecency analysis.

208. We find that although the complained-of phrases "sit their asses down" and "sucked" may be coarse expressions, in the context presented, they are not sufficiently vulgar, explicit, or graphic to support a patent offensiveness finding.[272] First, in the context presented, the word "sucked" is not an explicit or graphic description of sexual or excretory organs or activities. Its use does not invariably invoke a coarse sexual image. The phrase "sit their asses down" includes a coarse expression for the buttocks, but involves a command to sit down, rather than referring to sexual or excretory activity. In addition, while not dispositive, neither remark is repeated or dwelled upon. Furthermore, while this terminology may have been upsetting to some viewers, it is not sufficiently graphic, explicit, or sustained to support the conclusion that it was shocking, pandering or titillates the audience. Although use of such phrases may, depending on the context involved, contribute to a finding of indecency, their use here was not patently offensive and therefore not indecent.

209. Moreover, we find that the program's video montage, which allegedly "gave the appearance of" a depiction of oral sex, is not actionably indecent. In a re-

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[272] *See PTC 2*, 20 FCC Rcd at 1938 ¶ 8 (in context, words "dick," "hell," damn," "orgasm," "penis," "testicles," "breast," "nipples," "can," "pissed," "crap," "bastard," and "bitch" were not sufficiently explicit or graphic to be patently offensive).

cent case, the Commission denied substantially similar complaints directed against the broadcast of segments from the film "Austin Powers: The Spy Who Shagged Me."[273] Significantly, in this case, as in the "Austin Powers" film, the material cited in the complaint does not actually depict sexual organs or activities; it only uses superimposed images to allude to oral sex. Therefore, we find that the material does not explicitly or graphically depict sexual organs or activities. Furthermore, the image was extremely brief, lasting a mere fraction of a second. Finally, the visual allusion, in context, is not shocking or titillating, and in any event, is simply not explicit and graphic enough to be patently offensive as measured by contemporary community standards for the broadcast medium. Therefore, we find that it was not indecent. Accordingly, the complaints are denied.

12. "8 Simple Rules" (February 4, 2005)[274]

210. ***The Programming.*** The Commission received a complaint regarding the February 4, 2005 broadcast of the ABC Television Network program, "8 Simple Rules" between 6 a.m. and 10 p.m. Eastern Standard Time. According to the complaint, "[a]t the conclusion of the episode, I observed the mother and the oldest child as they stood near a hamster cage in the home. The older girl looked into a hamster cage and asked ' . . . what is it doing?' . . . then the girl said ' . . . hamsterbating.' This was a reference [that] the hamster was 'masturbating.'" The complaint urges the Commission to issue a public warning or fine against ABC and "to take a posi-

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[273] *See PTC 1*, 20 FCC Rcd at 1926-27, ¶¶ 7-9.

[274] FCC File No. EB-05-IH-0465.

tion not to allow this type of behavior and language on television."

211. ***Indecency Analysis.*** As an initial matter, we will assume but not decide that the broadcast falls within the subject-matter prong of our analysis, as it references the sexual activity of masturbation. We conclude, however, that the program is not indecent because it is not patently offensive as measured by the contemporary community standards for the broadcast medium.

212. Turning to the three principal factors that inform our contextual analysis, while the use of the term "hamsterbating" would be interpreted by many viewers as constituting a veiled reference to the sexual activity of masturbation, the term is neither graphic nor explicit, and the program never depicts any sexual activity or organ. Moreover, although not dispositive, it is also relevant to our analysis that the allusion to masturbation is not in any way sustained or dwelled upon. Finally, we conclude that while the use of the term "hamsterbating" may have disturbed some viewers of this program, which is aimed in part at a younger audience, the term's shock value is marginal at best, and in this context is outweighed by the non-explicit and non-repeated nature of the allegedly indecent material. For all of these reasons, we deny the complaint.

13. "The Today Show" (January 11, 2005)[275]

213. ***The Programming.*** The Commission received a complaint about the January 11, 2005 broadcast of "The Today Show" between 6 a.m. and 10 p.m. Eastern Standard Time. That program contained a segment showing scenes of the devastating floods and mudslides that had

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[275] FCC File No. EB-05-IH-0365.

occurred in California and of various rescue efforts. In one scene, viewers see an attempt to pull a man wearing only a shirt from raging water onto the safety of a highway overpass. As the man is hauled from water level to the boat, his penis is briefly exposed. At the end of the scene, the rescuers lose their grip on the man, and he goes crashing back into the water, narrowly missing a pillar of the overpass as he falls.

214. ***Indecency Analysis.*** In conducting our indecency analysis in this case, it is important to recognize and emphasize the context of the broadcast material. The complained-of segment contained contemporaneous coverage of an important news event. Therefore, we must exercise particular caution here as the complaint involves programming that implicates core First Amendment concerns. The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs and, therefore, is within the subject matter scope of the Commission's indecency definition. The broadcast clearly falls within the subject matter scope of our indecency definition because the scene includes a view of a man's penis, which is a sexual organ.[276] We thus turn to the second prong of our indecency analysis—a determination of whether the material at issue was patently offensive as measured by contemporary community standards for the broadcast medium.

215. Regarding the first principal component of our contextual analysis, although the Commission previously has found exposure of adult sexual organs to be graphic

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[276] *See Young Broadcasting NAL*, 19 FCC Rcd at 1754 (finding that a broadcast of performer's exposed penis satisfies subject matter prong of indecency analysis).

and explicit in certain situations,[277] in this particular context, we find that the complained-of material is not graphic or explicit. The shot of the man's penis is not at close range, and the overall focus of the scene is on the rescue attempt, not on the man's sexual organ. Here, the distant image of a man's penis in footage displaying efforts to rescue him from mortal peril is not explicit or graphic.

216. With respect to the second principal component of our contextual analysis, the segment does not dwell on or repeat the image of the victim's penis. To the contrary, the segment can be fairly described as providing only a brief glimpse of the penis that is incidental to the overall action portrayed—a human rescue effort.

217. Turning to the final principal component of our analysis, and the most important in this particular context, we find that the material does not pander to, titillate, or shock the viewing audience. Rather, it contains coverage of a significant news event and shows the human experience behind that event. To the extent there is shock value to the footage, it derives from the overall action portrayed—the effort to rescue a human life—not from the footage's minimal sexual content.

218. Since the material taken as a whole is not graphic or explicit, does not dwell on or repeat images of a sexual organ or activity, and does not appear to shock, pander, and/or titillate, it does not satisfy the second prong of our indecency analysis and, therefore, we deny the complaint. In doing so, we again recognize the need for particular caution with respect to complaints impli-

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[277] *Id*. *See also Super Bowl NAL*, 19 FCC Rcd at 19235 (finding that a broadcast of performer's breast was graphic and explicit).

cating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee.[278] We also emphasize the critical importance of context in determining whether a broadcast is patently offensive. In this regard, the contrast between this case and the *Young Broadcasting NAL* is instructive. Each involves the brief, accidental exposure of male frontal nudity during a news program. Unlike in this case, however, the performer's penis in the *Young Broadcasting NAL* was exposed at relatively close range.[279] More importantly, the display was not incidental to the coverage of a news event; rather, it occurred during an interview of performers who appear nude to manipulate their genitalia, and as the performer stood up to give an off-camera demonstration to the show's hosts.[280] Here, in contrast, the program's focus is a rescue effort, and the complained-of material is incidental and easily could evade the notice of a viewer focused on this effort.

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[278] *See Syracuse Peace Council*, 2 FCC Rcd at 5050-51 ¶ 52 (eliminating the fairness doctrine, which placed an affirmative obligation on broadcasters to cover, and present contrasting viewpoints on, controversial issues of public importance).

[279] 19 FCC Rcd at 1752.

[280] *Id.* at 1756-57. Noting the comments of off-camera employees urging the performers to conduct a nude demonstration, and the partially off-camera demonstration to the show's hosts, the Commission found that the display was pandering, titillating and shocking, notwithstanding the licensee's precautions to prevent such a display. *Id.* at 1757.

14. "The Simpsons" (September 9, 2004)[281]

219. ***The Programming.*** The Commission received a complaint regarding the broadcast of an episode of "The Simpsons" over Station WTTG(TV), Washington, D.C., at 6:30 p.m. Eastern Daylight Time on September 9, 2004.[282] The complaint states that the program contains a graphic and explicit depiction of a scene in a strip club. The Bureau requested and received a videotape of the program in question from Fox Television Stations, Inc., the licensee of the station.

220. The "Simpsons" is an animated comedy series featuring a number of regular characters, including the elderly Mr. Burns and his assistant Smithers. The complained-of episode, entitled "Hunka Hunka Burns In Love," deals with Mr. Burns's romantic ineptitude. The scene in question shows Mr. Burns leading Smithers into a club with a "Girls Girls Girls" sign and saying, "Maybe there are some girls in here." In the club, female cartoon characters dance around poles clothed in two-piece or one-piece lingerie or underwear. Mr. Burns reacts by saying, "Great Heavens! This is one of those nude female fire stations! Oh, I'd always be second place to some kitten stuck in a tree. Let's go, Smithers." Smithers is momentarily depicted as crouching and whimpering in embarrassment as he is cornered by two dancers. Although the complaint states that the scene depicts physical contact between Smithers and a female cartoon dancer's buttocks, we were unable to confirm this statement based on our viewing of the tape.

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[281] FCC File No. EB-05-IH-0041.

[282] *See* Complaint dated September 8, 2004.

221. ***Indecency Analysis.*** As an initial matter, for purposes of this analysis, we assume without deciding that the depiction of female cartoon characters dancing in lingerie falls within the subject-matter prong of our indecency standard. We conclude, however, that the program is not indecent because it is not patently offensive as measured by the contemporary community standards for the broadcast medium.

222. Regarding the first principal component of our contextual analysis, we conclude that the complained-of material does not graphically or explicitly depict sexual organs or activities. Although the movements of the two female dancers shown with Smithers are somewhat sexually suggestive, and one of the dancers is shown from behind wearing a "thong," the scene is not graphic. No cartoon character is shown completely nude, and there are no clear depictions of physical contact involving the cartoon characters's sexual organs in the scene. Moreover, although a cartoon might be patently offensive if it contained sufficiently graphic or explicit depictions of sexual or excretory organs or activities, in this context the animation weighs against a finding of patent offensiveness: the characters are linear representations, and to the extent they are depicted in sexually-suggestive clothing or situations, the animation makes those depictions inherently less graphic and explicit than, for example, those involved in the "Video Musicales" program discussed above in Section III.A.4.

223. With respect to the second principal component of our contextual analysis, the scene is relatively brief and does not dwell on depictions of sexual organs or ac-

tivities.[283] Turning to the final principal component of our analysis, we do not find that the material is panders to, titillates, or shocks the viewing audience within the context of the program at issue. Rather, the scene is a relatively brief vignette about the male characters' romantic ineptitude. Since the material taken as a whole is not graphic, explicit, or sustained and does not appear to shock, pander, and/or titillate, we find that it is not patently offensive. Accordingly, we deny the complaint.

15. "America's Funniest Home Videos" (February 5, 2005)[284]

224. ***Programming.*** The Commission received a complaint regarding the February 5, 2005 episode of the ABC Television Network program "America's Funniest Videos" ("AFV") that was broadcast over Station WHAM (TV), Rochester, New York. The complaint alleged that this episode, which aired from 8:00 to 8:30 p.m. Eastern Standard Time, included a clip in which a "butt plug" was allegedly inserted into a naked male infant. As part of the investigation in this matter, the Enforcement Bureau requested and received from the licensee a videotape of that AFV episode. This videotape reveals that the episode depicted a naked infant falling back onto his pacifier, which then becomes wedged between his buttocks.

225. ***Indecency Analysis.*** The first prong of our indecency analysis is whether the program depicts or describes sexual or excretory activities or organs, and,

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[283] *Compare Married By America*, 19 FCC Rcd at 20195, ¶ 12 (finding material to be sustained where scene at issue lasted approximately 6 minutes).

[284] FCC File No. EB-05-IH-0212.

therefore, is within the subject matter scope of the Commission's indecency definition. Because this videotape depicts a child's nude buttocks, we find that it depicts both excretory and sexual organs,[285] and the broadcast therefore falls within the subject matter scope of our indecency analysis. We must then turn to the next part of our analysis—whether the broadcast was "patently offensive" as measured by contemporary community standards for the broadcast medium.

226. Turning to the first principal factor in our contextual analysis of whether material is patently offensive, the segment at issue shows a naked infant falling back onto his pacifier, which then becomes wedged between his buttocks and is therefore marginally explicit. With regard to the second factor, while not dispositive, the broadcast does not dwell on or repeat at length any description or depiction of sexual or excretory organs or activities.[286] Rather, the program shows the relevant segment once and then moves on to other videotapes. And finally, the footage does not appear to shock, pander, or titillate. The depiction, submitted by the infant's parents, is not sexualized in any manner whatsoever. In conclusion, based on our review of the full context of the broadcast, we find that the broadcast is not indecent. Although, as indicated above, the footage is somewhat explicit, its brevity and the absence of any shocking, pandering, or titillate effect on the audience outweigh that factor in our analysis. As we held in the *Indecency*

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[285] *See supra* note 97.

[286] *See PTC 2*, 20 FCC Rcd at 1938 ¶ 9 (finding that a rudimentary depiction of a cartoon boy's buttocks was fleeting, and, in context, was not sufficiently graphic or explicit, or sustained, to rise to the level of being patently offensive).

Policy Statement, "no single factor generally provides the basis for an indecency finding."[287] Accordingly, the complaint is denied.

16. "Green Bay Packers v. Minnesota Vikings" (January 9, 2005)[288]

227. ***The Programming.*** The Commission received complaints regarding a broadcast over the Fox Television Network ("Fox" or "Fox Network") on the evening of January 9, 2005 prior to 10 p.m. Eastern Standard Time. The complaints allege that during the broadcast of the National Football League playoff game between the Green Bay Packers and the Minnesota Vikings, Fox broadcast the image of a player for the visiting Vikings team who, after scoring a touchdown, acted as if he were lowering his pants and exposing his buttocks to the crowd at Green Bay's Lambeau Field, although he remained fully clothed at all times. In other words, the player pretended to "moon" the crowd. The complaints seek an indecency finding and proposed monetary forfeitures against all Fox Network affiliate stations.

228. ***Indecency Analysis.*** Assuming without deciding that the broadcast of a mimed "mooning" depicts a sexual or excretory organ and thus falls within the subject matter prong of our indecency analysis, we nevertheless conclude that the material is not patently offensive as measured by contemporary community standards for the broadcast medium and thus is not indecent.

229. Each of the three principal factors that inform our contextual analysis weighs against a finding of patent offensiveness. First, the display involves only

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[287] *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10.

[288] FCC File No. EB-05-IH-0032.

mimed actions by a fully-clothed player and thus is not graphic or explicit. Second, although not dispositive, it is also relevant that the images are not dwelled upon; the images appear for only a few seconds, and are not replayed during the broadcast. Finally, while we can understand why many viewers may have perceived the player's touchdown celebration as plainly inappropriate, we do not believe that his fully clothed display titillates or rises to the level of shocking behavior. Accordingly, we deny the complaints.

17. "Medium" (January 17, 2005)[289]

231. ***The Programming.*** The Commission received a complaint concerning the NBC Television Network ("NBC") broadcast of the program "Medium," at 9:00 p.m. Central Standard Time on January 17, 2005. The Enforcement Bureau requested and received a videotape of the program from NBC. A review of the tape discloses that the episode begins with a husband and wife being counseled by a therapist in an office setting. During the course of conversation with the couple, the therapist asks the husband to act out his selfish feelings by doing something with (or to) his wife, even if society might not approve of the act, and tells him that he should not be embarrassed because the therapist "has seen it all." In response, the husband stands up and faces this wife. He then pulls out a gun from his waist, and shoots his wife in the face.[290] The complainant ob-

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[289] FCC File No. EB-05-IH-0463.

[290] The complaint states that the husband "unzips his pants" before shooting his wife, but our review of the videotape shows that the husband appears to simply remove a handgun from the area of his waist. No unzipping of pants is shown or heard during the scene.

jects to this portrayal of sex associated with violence against women broadcast at that hour of the evening.

231. ***Indecency Analysis.*** As discussed above, our definition of indecent programming is limited to material that describes or depicts sexual or excretory organs or activities.[291] Violence *per se* is not currently within the defined subject matter scope of these limitations on broadcast programming. The complained-of portion of the episode arguably contains dialogue that suggests the possibility that the husband might wish to engage in some kind of sexual activity with his wife. However, no such activity is described or takes place, and thus the material is not within the scope of our indecency definition. Accordingly, we must deny the complaint.

232. We wish to emphasize, however, that we understand the concerns of the complainant and others with the issue of violent programming on television, as well as the bizarre and shocking violence that is portrayed in the complained-of episode. Last year, at Congress's urging, we initiated a proceeding to examine violent television programming and its impact on children.[292] In doing so, we sought information about the nature and amount of violent television programming, its effects, what measures are available to control exposure to me-

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[291] *See Indecency Policy Statement*, 16 FCC Rcd at 8000 ¶ 4 (noting that "in addition, the [*Pacifica*] Court quoted the Commission's definition of indecency with apparent approval. The definition, "language or material that, in context depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs," has remained substantially unchanged since the time of the *Pacifica* decision") (internal citations omitted).

[292] *See Violent Television Programming and Its Impact on Children*, Notice of Inquiry, 19 FCC Rcd 14394 (2004).

dia violence, and the need for and the legal basis of our ability, if any, to regulate in this area. We have invited the public to submit comments for our consideration, and are currently reviewing those comments and determining our next steps.

IV. ORDERING CLAUSES

233. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that NBC Telemundo License Co., licensee of Station KWHY-TV, Los Angeles, California is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of $32,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its October 9, 2004, broadcast of the movie "Con El Corazon En La Mano."[293]

234. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to F. William LeBeau, Senior Regulatory Counsel & Assistant Secretary, NBC Universal, Inc., 1299 Pennsylvania Avenue, N.W., 11th Floor, Washington, D.C. 20004.

235. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that Sherjan Broadcasting Company, Inc., licensee of Station WJAN-CA, Miami, Florida, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of $32,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's

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[293] NAL Account Number 200632080007, FRN No. 0014139422, Facility ID No. 26231.

rules by its October 19, 2004, broadcast of the "Fernando Hidalgo Show."[294]

236. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to Peter Tannenwald, counsel for Sherjan Broadcasting Company, Inc., Irwin Campbell & Tannenwald, PC, 1730 Rhode Island Avenue, N.W., Suite 200, Washington, D.C. 20036-3101.

237. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that Aerco Broadcasting Corp., licensee of Station WSJU-TV, San Juan, Puerto Rico, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of $220,000 for willfully and repeatedly violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its broadcast of various music videos, described above in the *NAL and MO&O*, during the "Video Musicales" program from January through March 2002.[295]

238. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to John A. Borsari, counsel for Aerco Broadcasting Corp., John A. Borsari & Associates, PLLC, 2111 Wilson Blvd., P.O. Box 100009, Suite 700, Arlington, Virginia 22210; and David Ramos, D'Vanguardia, 497 Ave. E. Pol. Apartado 187, San Juan, Puerto Rico 00926-5636.

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[294] NAL Account Number 200632080008, FRN No. 0003756897, Facility ID No. 60165.

[295] NAL Account Number 200632080010, FRN No. 0003732435, Facility ID No. 4077.

239. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that WBDC Broadcasting, Inc., licensee of Station WBDC-TV, Washington, D.C., is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of $27,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its February 8, 2004 broadcast of "The Surreal Life 2."[296]

240. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to Arthur H. Harding, Fleischman and Walsh, LLP, counsel for the WB Television Network, 1919 Pennsylvania Avenue, N.W., Suite 600, Washington, D.C. 20006; R. Clark Wadlow and Thomas P. Van Wazer, Sidley Austin Brown & Wood LLP, counsel for WBDC Broadcasting, Inc., 1501 K Street, N.W., 10th Floor, Washington, D.C. 20005; and Dan Issett, Director of Corporate and Government Affairs, Parents Television Council, 325 S. Patrick Street, Alexandria, Virginia 22314.

241. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that San Mateo County Community College District, licensee of noncommercial educational Station KCSM-TV, San Mateo, California, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of $15,000 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its broadcast

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[296] NAL Account Number 200632080011, FRN No. 0002833267, Facility ID No. 30576.

of "The Blues: Godfathers and Sons" on March 11, 2004.[297]

242. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to Marilyn R. Lawrence, General Manager, Station KCSM-TV, San Mateo County Community College District, 1700 West Hillsdale Blvd, San Mateo, California 94402.

243. IT IS FURTHER ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, that KTVI License, Inc., licensee of Station KTVI(TV), St. Louis, Missouri, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of $27,500 for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules by its broadcast of "The Pursuit of D.B. Cooper" on March 15, 2003.[298]

244. IT IS FURTHER ORDERED that a copy of this *NAL and MO&O* shall be sent by Certified Mail, Return Receipt Requested, to John C. Quale, Counsel for KTVI License, Inc., Skadden Arps Meagher & Flom, LLP, 1440 New York Avenue, N.W., Washington, D.C. 20005-2111.

245. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty (30) days of the release of these *NALs*, each licensee identified above SHALL PAY the full amount of its pro-

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[297] NAL Account Number 200632080012, FRN No. 0001545185, Facility ID No. 58912.

[298] NAL Account Number 200632080089, FRN No. 0003476009, Facility ID No. 35693.

posed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of their proposed forfeiture.

246. Payment of each forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. Payments must include the relevant NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

247. The responses, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington D.C. 20554, and MUST INCLUDE the relevant NAL/Acct. No. referenced for each proposed forfeiture above.

248. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

249. Requests for payment of the full amount of these *NALs* under an installment plan should be sent to: Associate Managing Director—Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.[299]

250. Accordingly, IT IS ORDERED that the complaints in the above-referenced *NAL* proceedings ARE GRANTED to the extent indicated herein, AND ARE OTHERWISE DENIED, and the complaint proceedings ARE HEREBY TERMINATED.

251. IT IS FURTHER ORDERED that the complaints referenced in these *NALs and MO&O* are GRANTED to extent set forth herein and otherwise DENIED.[300]

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[299] *See* 47 C.F.R. § 1.1914.

[300] Consistent with section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by each *NAL* in this *Order*, the only party or parties to such proceeding will be the licensee or licensees specified above.

STATEMENT OF CHAIRMAN KEVIN J. MARTIN

Re: Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show; Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace"

Congress has long prohibited the broadcasting of indecent and profane material and the courts have upheld challenges to these standards. But the number of complaints received by the Commission has risen year after year. They have grown from hundreds, to hundreds of thousands. And the number of programs that trigger these complaints continues to increase as well. I share the concerns of the public - and of parents, in particular- that are voiced in these complaints.

I believe the Commission has a legal responsibility to respond to them and resolve them in a consistent and effective manner. So I am pleased that with the decisions released today the Commission is resolving hundreds of thousands of complaints against various broadcast licensees related to their televising of 49 different programs. These decisions, taken both individually and as a whole, demonstrate the Commission's continued commitment to enforcing the law prohibiting the airing of obscene, indecent and profane material.

Additionally, the Commission today affirms its initial finding that the broadcast of the Super Bowl XXXVIII Halftime Show was actionably indecent. We appropri-

ately reject the argument that CBS continues to make that this material is not indecent. That argument runs counter to Commission precedent and common sense.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Complaints Regarding Various Television Broadcasts Between January 1, 2002 and March 12, 2005

Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace," Notice of Apparent Liability for Forfeiture

Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Forfeiture Order

In the past, the Commission too often addressed indecency complaints with little discussion or analysis, relying instead on generalized pronouncements. Such an approach served neither aggrieved citizens nor the broadcast industry. Today, the Commission not only moves forward to address a number of pending complaints, but does so in a manner that better analyzes each broadcast and explains how the Commission determines whether a particular broadcast is indecent. Although it may never be possible to provide 100 percent certain guidance because we must always take into account specific and often-differing contexts, the approach in today's orders can help to develop such guidance and to establish precedents. This measured process, common in jurisprudence, may not satisfy those who clamor for immediate certainty in an uncertain world, but it may just be the best way to develop workable rules of the road.

Today's Orders highlight two additional issues with which the Commission must come to terms. First, it is

time for the Commission to look at indecency in the broader context of its decisions on media consolidation. In 2003 the FCC sought to weaken its remaining media concentration safeguards without even considering whether there is a link between increasing media consolidation and increasing indecency. Such links have been shown in studies and testified to by a variety of expert witnesses. The record clearly demonstrates that an overwhelming number of the Commission's indecency citations have gone to a few huge media conglomerates. One recent study showed that the four largest radio station groups which controlled just under half the radio audience were responsible for a whopping 96 percent of the indecency fines levied by the FCC from 2000 to 2003.

One of the reasons for the huge volume of complaints about excessive sex and graphic violence in the programming we are fed may be that people feel increasingly divorced from their "local" media. They believe the media no longer respond to their local communities. As media conglomerates grow ever larger and station control moves farther away from the local community, community standards seem to count for less when programming decisions are made. Years ago we had independent programming created from a diversity of sources. Networks would then decide which programming to distribute. Then local affiliates would independently decide whether to air that programming. This provided some real checks and balances. Nowadays so many of these decisions are made by vertically-integrated conglomerates headquartered far away from the communities they are supposed to be serving—entities that all too often control both the distribution ***and*** the production content of the programming.

If heightened media consolidation is indeed a source for the violence and indecency that upset so many parents, shouldn't the Commission be cranking that into its decisions on further loosening of the ownership rules? I hope the Commission, before voting again on loosening its media concentration protections, will finally take a serious look at this link and amass a credible body of evidence and not act again without the facts, as it did in 2003.

Second, a number of these complaints concern graphic broadcast violence. The Commission states that it has taken comment on this issue in another docket. It is time for us to step up to the plate and tackle the issue of violence in the media. The U.S. Surgeon General, the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, and countless other medical and scientific organizations that have studied this issue have reached the same conclusion: exposure to graphic and excessive media violence has harmful effects on the physical and mental health of our children. We need to complete this proceeding.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN CONCURRING IN PART, DISSENTING IN PART

Re: *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order

I have sworn an oath to uphold the Constitution[1] and to carry out the laws adopted by Congress.[2] Trying to find a balance between these obligations has been challenging in many of the indecency cases that I have decided. I believe it is our duty to regulate the broadcast of indecent material to the fullest extent permissible by the Constitution because safeguarding the well-being of our children is a compelling national interest.[3] I therefore have supported efforts to step up our enforcement of indecency laws since I joined the Commission.

The Commission's authority to regulate indecency over the public airwaves was narrowly upheld by the Supreme Court with the admonition that we should exercise that authority with the utmost restraint, lest we inhibit constitutional rights and transgress constitutional limitations on government regulation of protected speech.[4] Given the Court's guidance in *Pacifica*, the

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[1] U.S. CONST., amend. I.

[2] Congress has specifically forbidden the broadcast of obscene, indecent or profane language. 18 U.S.C. § 1464. It has also forbidden censorship. 47 U.S.C. § 326.

[3] *See, e.g., N.Y. v. Ferber*, 458 U.S. 747, 756-57 (1982).

[4] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (emphasizing the "narrowness" of the Court's holding); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I*")

Commission has repeatedly stated that we would judiciously walk a "tightrope" in exercising our regulatory authority.[5] Hence, within this legal context, a rational and principled "restrained enforcement policy" is not a matter of mere regulatory convenience. It is a constitutional requirement.[6]

Accordingly, I concur in part and dissent in part with today's decision because, while in some ways the decision does not go far enough, in other ways it goes too far. Significantly, it abruptly departs from our precedents by adopting a new, weaker enforcement mechanism that arbitrarily fails to assess fines against broadcasters who have aired indecent material. Additionally, while today's decision appropriately identifies violations of our indecency laws, not every instance determined to be indecent meets that standard.

We have previously sought to identify all broadcasters who have aired indecent material and hold them accountable. In this Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was the subject of a viewer's complaint, even though we know millions of other Americans

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("Broadcast material that is indecent but not obscene is protected by the [F]irst [A]mendment.").

[5] *See* Brief for Petitioner, FCC, 1978 WL 206838 at *9.

[6] *ACT I*, *supra* note 4, at 1344 ("[T]he FCC may regulate [indecent] material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear."); *Id.* at 1340 n.14 ("[T]he potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy."). *See also Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, FCC 06-17 at note 11 (rel. March 15, 2006).

were exposed to the offending broadcast. I cannot find anywhere in the law that Congress told us to apply indecency regulations only to those stations against which a complaint was specifically lodged. The law requires us to prohibit the broadcast of indecent material, period. This means that we must enforce the law anywhere we determine it has been violated. It is willful blindness to decide, with respect to network broadcasts we know aired nationwide, that we will only enforce the law against the local station that happens to be the target of viewer complaints. How can we impose a fine solely on certain local broadcasters, despite having repeatedly said that the Commission applies a national indecency standard—not a local one?[7]

The failure to enforce the rules against some stations but not others is not what the courts had in mind when they counseled restraint. In fact, the Supreme Court's decision in *Pacifica* was based on the uniquely pervasive characteristics of broadcast media.[8] It is patently arbitrary to hold some stations but not others accountable for the same broadcast. We recognized this just two years ago in *Married By America*.[9] The Commission

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[7] *See, e.g., In re Sagittarius Broadcasting Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6873, 6876 (1992) (subsequent history omitted).

[8] *See Pacifica Found.*, 438 U.S. at 748-49 (recognizing the "uniquely pervasive presence" of broadcast media "in the lives of all Americans"). In today's Order, paragraph 10, the Commission relies upon the same rationale.

[9] *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20196 (2004) (proposing a $7,000 forfeiture against each Fox Station and Fox Affiliate station); *reconsideration pending*.

simply inquired who aired the indecent broadcast and fined all of those stations that did so.

In the *Super Bowl XXXVIII Halftime Show* decision, we held only those stations owned and operated by the CBS network responsible, under the theory that the affiliates did not expect the incident and it was primarily the network's fault.[10] I dissented in part to that case because I believed we needed to apply the same sanction to every station that aired the offending material. I raise similar concerns today, in the context of the instant Order.

The Commission is constitutionally obligated to decide broadcast indecency and profanity cases based on the "contemporary community standard," which is "that of the average broadcast viewer or listener." The Commission has explained the "contemporary community standard," as follows:

> We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and

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See also Clear Channel Broad. Licenses, Inc., 19 FCC Rcd 6773, 6779 (2004) (proposing a $495,000 fine based on a "per utterance" calculation, and directing an investigation into stations owned by other licensees that broadcast the indecent program). In the instant Omnibus Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was actually the subject of a viewer's complaint to the Commission. *Id.* at ¶ 71.

[10] *See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability, 19 FCC Rcd 19230 (2004).

> ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.[11]

I am concerned that today's Order overreaches with its expansion of the scope of indecency and profanity law, without first doing what is necessary to determine the appropriate contemporary community standard.

The Order builds on one of the most difficult cases we have ever decided, *Golden Globe Awards*,[12] and stretches it beyond the limits of our precedents and constitutional authority. The precedent set in that case has been contested by numerous broadcasters, constitutional scholars and public interest groups who have asked us to revisit and clarify our reasoning and decision. Rather than reexamining that case, the majority uses the decision as a springboard to add new words to the pantheon of those deemed to be inherently sexual or excretory, and consequently indecent and profane, irrespective of their common meaning or of a fleeting and isolated use. By failing to address the many serious concerns raised in the reconsideration petitions filed in the *Golden Globe Awards* case, before prohibiting the use of additional words, the Commission falls short of meeting the constitutional standard and walking the tightrope of a restrained enforcement policy.

This approach endangers the very authority we so delicately retain to enforce broadcast decency rules. If the Commission in its zeal oversteps and finds our au-

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[11] *In re Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004).

[12] *In re Complaints Against Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004); *petitions for stay and reconsideration pending.*

thority circumscribed by the courts, we may forever lose the ability to protect children from the airing of indecent material, barring an unlikely constitutional amendment setting limitations on the First Amendment freedoms.

The perilous course taken today is evident in the approach to the acclaimed Martin Scorsese documentary, "The Blues: Godfathers and Sons." It is clear from a common sense viewing of the program that coarse language is a part of the culture of the individuals being portrayed. To accurately reflect their viewpoint and emotions about blues music requires airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary. This contextual reasoning is consistent with our decisions in *Saving Private Ryan*[13] and *Schindler's List*.[14]

The Commission has repeatedly reaffirmed, and the courts have consistently underscored, the importance of content *and* context. The majority's decision today dangerously departs from those precedents. It is certain to strike fear in the hearts of news and documentary mak-

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[13] *In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film, "Saving Private Ryan,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4513 (2005) ("Deleting all [indecent] language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers"); *See also Peter Branton*, Letter by Direction of the Commission, 6 FCC Rcd 610 (1991) (concluding that repeated use of the f-word in a recorded news interview program not indecent in context).

[14] *In the Matter of WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838 (2000).

ers, and broadcasters that air them, which could chill the future expression of constitutionally protected speech.

We should be mindful of Justice Harlan's observation in *Cohen v. California*.[15] Writing for the Court, he observed:

> [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[16]

Given all of these considerations, I find that today's decision, while reaching some appropriate conclusions both in identifying indecent material and in dismissing complaints, is in some ways dangerously off the mark. I cannot agree that it offers a coherent, principled long-term framework that is rooted in common sense. In fact, it may put at risk the very authority to protect children that it exercises so vigorously.

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[15] 403 U.S. 15 (1971).

[16] *Id.* at 26 ("We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process").

STATEMENT OF COMMISSIONER DEBORAH TAYLOR TATE

Re: *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show,* Forfeiture Order; *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without A Trace,"* Notice of Apparent Liability; *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order

Today marks my first opportunity as a member of the Federal Communications Commission to uphold our responsibility to enforce the federal statute prohibiting the airing of obscene, indecent or profane language.[1] To be clear—I take this responsibility very seriously. Not only is this the law, but it also is the right thing to do.

One of the bedrock principles of the Communications Act of 1934, as amended, is that the airwaves belong to the public. Much like public spaces and national landmarks, these are scarce and finite resources that must be preserved for the benefit of all Americans. If numbers are any indication, many Americans are not happy about the way that their airwaves are being utilized. The number of complaints filed with the FCC reached over one million in 2004. Indeed, since taking office in January 2006, I have received hundreds of personal e-mails from people all over this country who are unhappy

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[1] *See* 18 U.S.C. § 1464.

with the content to which they—and, in particular, their families—are subjected.

I have applauded those cable and DBS providers for the tools they have provided to help parents and other concerned citizens filter out objectionable content. Parental controls incorporated into cable and DBS set-top boxes, along with the V-Chip, make it possible to block programming based upon its content rating. However, these tools, even when used properly, are not a complete solution. One of the main reasons for that is because much of the content broadcast, including live sporting events and commercials, are not rated under the two systems currently in use.

I also believe that consumers have an important role to play as well. Caregivers—parents, in particular—need to take an active role in monitoring the content to which children are exposed. Even the most diligent parent, however, cannot be expected to protect their children from indecent material broadcast during live sporting events or in commercials that appear during what is marketed to be "appropriate" programming.

Today, we are making significant strides toward addressing the backlog of indecency complaints before this agency. The rules are simple—you break them and we will enforce the law, just as we are doing today. Both the public and the broadcasters deserve prompt and timely resolution of complaints as they are filed, and I am glad to see us act to resolve these complaints. At the same time, however, I would like to raise a few concerns regarding the complaints we address in these decisions.

First, I would like to discuss the complaint regarding the 6:30 p.m. Eastern Daylight Time airing of an episode of *The Simpsons*. The *Order* concludes that this seg-

ment is not indecent, in part because of the fact that *The Simpsons* is a cartoon. Generally speaking, cartoons appeal to children, though some may cater to both children and adults simultaneously. Nevertheless, the fact remains that children were extremely likely to have been in the viewing audience when this scene was broadcast. Indeed, the marketing is aimed at children. If the scene had involved real actors in living color, at 5:30 p.m. Central Standard Time, I wonder if our decision would have been different? One might argue that the cartoon medium may be a more insidious means of exposing young people to such content. By their very nature, cartoons do not accurately portray reality, and in this instance the use of animation may well serve to present that material in a more flattering light than it would if it were depicted through live video. I stop short of disagreeing with our decision in this case, but note that the animated nature of the broadcast, in my opinion, may be cause for taking an even closer look in the context of our indecency analysis.

Second, our conclusion regarding the 9:00 p.m. Central Standard Time airing of an episode of *Medium* in which a woman is shot at point-blank range in the face by her husband gives me pause. While I agree with the result in this case, I question our conclusion that the sequence constitutes violence *per se* and therefore falls outside the scope of the Commission's definition of indecency. Without question, this scene is violent, graphically so. Moreover, it is presented in a way that appears clearly designed to maximize its shock value. And therein lies my concern. One of the primary ways that this scene shocks is that it leads the viewer to believe that the action is headed in one direction—through dialogue and actions which suggest that interaction of a sexual

nature is about to occur—and then abruptly erupts in another—the brutally violent shooting of a wife by her husband, in the head, at point-blank range. Even though the Commission's authority under Section 1464 is limited to indecent, obscene, and profane content, and thus does not extend to violent matter, the use of violence as the "punch line" of titillating sexual innuendo should not insulate broadcast licensees from our authority. To the contrary, the use of sexual innuendo may, depending on the specific case, subject a licensee to potential forfeiture, regardless of the overall violent nature of the sequence in which such sexual innuendo is used.

* * *

Finally, I would like to express my hope and belief that the problem of indecent material is one that can be solved. Programmers, artists, writers, broadcasters, networks, advertisers, parents, public interest groups, and, yes, even Commissioners can protect two of our country's most valuable resources: the public airwaves and our children's minds. We must take a stand against programming that robs our children of their innocence and constitutes an unwarranted intrusion into our homes. By working together, we should promote the creation of programming that is not just entertaining, but also positive, educational, healthful, and, perhaps, even inspiring.

MINNESOTA PUBLIC RADIO®

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[Received: Sept. 21, 2006]

September 21, 2006

Marlene H. Dortch, Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

Attn: William H. Davenport, Chief
Investigations and Hearings Division Enforcement Bureau
Room 4-C330

Re: In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints

To the Commissioners:

We respectfully submit the following comments and declarations in response to the recent public notice in the above-referenced matter, *FCC Announces Filing Procedures in Connection with Court Remand of Section*

III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints, DA 06-1739 (rel. Sept. 7, 2006) (*"Public Notice"*). We believe that the unprecedented expansion of the regulation of broadcast "indecency" and "profanity" by the Commission over the past two years is chilling many types of expression that, in our judgment, the public ought to be able to see and hear, or unnecessarily subjects broadcasters to the risk of substantial fines or other sanctions, including non-renewal of their licenses, if they air such broadcasts. Submitted herewith are declarations by:

- Thomas J. Kigin, on behalf of Minnesota Public Radio/American Public Media
- Garrison Keillor
- Stanley A. ("Bud") Wilkinson, Jr., on behalf of *Broadway's Biggest Hits'*
- Dennis Fisher, on behalf of Pennsylvania television station WNEP, and
- Robert J. Sikorski, on behalf of Niagara Frontier Radio Reading Service, Inc.

The attached declarations illustrate these effects, and I respectfully refer you to them.

Thank you for your attention to this matter.

Sincerely,

/s/ MITZI T. GRAMLING
MITZI T. GRAMLING
Associate General Counsel

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

No. FCC 06-17

IN THE MATTER OF
COMPLAINTS REGARDING VARIOUS TELEVISION
BROADCASTS BETWEEN FEBRUARY 2, 2002 AND
MARCH 8, 2005; COURT REMAND OF SECTION III.B
OF THE COMMISSION'S MARCH 15, 2006 OMNIBUS
ORDER RESOLVING NUMEROUS BROADCAST
TELEVISION INDECENCY COMPLAINTS

I, THOMAS J. KIGIN, do hereby declare as follows:

1. I am employed as the Executive Vice President and General Counsel of Minnesota Public Radio/American Public Media ("MPR/APM"). I make this Declaration on MPR/APM's behalf in response to the recent Public Notice in the above-captioned matter, *FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006) (*"Public Notice"*). Except to the extent expressly indicated to the contrary, this Declaration is made upon my own personal knowledge and/or records maintained by MPR/APM in the ordinary course of its business and I would be competent to testify to the facts set forth herein.

2. MPR, a non-profit organization, is a regional public radio network based in St. Paul, Minnesota that serves some 650,000 listeners each week across seven states on 37 public radio stations. MPR provides three program services: a news and information service, a classical music service, and a contemporary music service. In addition, as American Public Media, MPR/APM produces more nationally distributed original programming, including documentaries and news programming, than any other station-based public radio organization —indeed, national programming produced by MPR/APM reaches some 14 million people per week. MPR/APM has won more than 800 journalism awards, including the Peabody Award and the Alfred I. duPont-Columbia University Gold Baton in 2001. MPR/APM has over 740 affiliate stations around the country who broadcast programs produced and distributed by APM.

3. MPR/APM's target audience for most of its programming is obviously adults. However, we recognize that children may be listening along with their parents, while in the car, for example. While the vast majority of MPR/APM's programming does not involve language that may be viewed as inappropriate for children, or can be prepared without using such language, MPR/APM has on occasion, after giving the matter careful editorial scrutiny, included adult language in news reports and other programs where the inclusion of such language is, in our editorial judgment, important to the report or program. We do not include such language gratuitously, but sometimes conclude that to omit it would so change the quality of our content that its inclusion in our programming is, in our editorial judgment, essential.

4. As a result, MPR/APM has been and will continue to be directly and negatively affected by the FCC's expansion in enforcement of the prohibitions on broadcast "indecency" and "profanity" over the past two years and its effectively ad hoc approach in applying those prohibitions. Indeed, it now appears that the FCC will apply its prohibition of the so-called "F" word, and analogous words as well, based on its own judgments as to the context and the literary or political merit of the work in which the word appears.

5. The prospect of huge fines and the threat of license revocation and/or non-renewal for broadcast licensees have caused MPR/APM to alter the way it makes decisions about its programming. The enactment of the Broadcast Decency Enforcement Act ("BDEA"), which dramatically increases those fines, will no doubt exacerbate these negative effects on our programming decisions. Regrettably, MPR/APM's decisions are no longer based solely on editorial judgments that have well-served a large listener audience for many years, but instead on the prospect of crippling financial and legal risks for MPR/APM and its affiliates. MPR simply cannot risk either huge fines or license revocation for the MPR's 37 radio stations or APM's 740 affiliate stations if it were to guess wrong about what is now acceptable for broadcast.

6. In light of this enforcement regime, MPR has adopted a number of practices. For example, MPR/APM now briefs participants in live programming of the forbidden words (as best MPR/APM understands them) and requests that all participants refrain from using any of them. In one such instance, for example, highly-regarded Minnesota writer and musician Bill Holm

planned to read from a well-known poem during the program *"A Literary View®,"* which was to be recorded before a live audience at the College of St. Benedict in St. Joseph, Minnesota and then broadcast by MPR on its network of stations the next day. The program was intended as a discussion among authors and musicians about the interrelationship of language and music. The poem in question, "Stella by Starlight," by Phil Bryant, addresses issues of language. In one passage of his poem, Bryant observes that, were one "to quote any passage out of Shakespeare, every other word was 'fucking' this and 'fucking' that." Admonished by MPR for fear of FCC sanction, however, Mr. Holm omitted the "F" words when he read the poem. And, thus, the version of the poem heard by MPR's listeners was as follows: ". . . to quote any passage of Shakespeare, every other word was 'dirty word' this and 'dirty word' that." The citizens of Minnesota can and do expect more from their broadcasters than this obsessive focus on individual words in larger works of considerable merit, but such an obsessive focus is precisely what MPR/APM, by virtue of the FCC's current approach regulating "indecency" and "profanity," coupled with the draconian fines available under the BDEA, must now employ.

7. Another example concerned a September 2004 interview with well-regarded poet and author Nick Flynn, whose most recent book was titled, "Another Bullshit Night in Suck City." Mr. Flynn, an assistant professor of literature at the University of Houston, has won a variety of awards for his previous works, including the PEN/Joyce Osterweil Award, a Discovery/The Nation Prize, fellowships from the Library of Congress and the Guggenheim Foundation, and he was a finalist

for the L.A. Times Book Prize. "Another Bullshit Night in Suck City" is a memoir about Mr. Flynn's father, their relationship, and homelessness: Mr. Flynn's father was homeless late in his life, and the book's title is drawn from a phrase his father would utter to describe his life on the streets. The book, which has been widely praised and described by at least one critic as a "significant work of art," is available nationwide in most bookstores and, so far as MPR/APM is aware, in most libraries. It provides important social commentary and, for that reason, MPR/APM, like a number of other public and private broadcasters, undertook to interview its author. In the wake of the FCC's Golden Globes decision, however, MPR/APM was concerned that reciting the book's title on air could make MPR/APM a target for a complaint to the FCC, a concern that would be heightened today in light of the March 15, 2006 Omnibus Order ("Omnibus Order") which specifically found the use of the term "bullshit" to be indecent—despite its use to mean "nonsense" or something that cannot be believed, rather than to refer to an excretory function. *See* Omnibus Order "125-131. Accordingly, MPR/APM determined that it had no choice but to (1) warn parents at the beginning of the program that the host was about to interview the author of a book with a potentially offensive title, (2) use the full title of the book only once at the beginning of the interview, immediately following the parental notice, and (3) refer to the book in the remainder of the interview as "Another BS Night in Suck City." MPR/APM did so despite our belief that the audience would have understood the context in which the proper title was being used and would not have been offended by it, but MPR/APM had no confidence that the FCC would view the matter the same way if a person

not a regular member of MPR/APM's audience used the broadcast as an opportunity to initiate a complaint.

8. MPR/APM has a sister organization, non-profit Southern California Public Radio ("SCPR"). SCPR had, for several years, broadcast the audio from performances at LA Theater Works, a highly regarded forum for new plays and other performances in Los Angeles, on the station KPCC-FM in Pasadena, a station operated by SCPR. The broadcasts typically have been on Saturday nights at 8:00 p.m. local time—consistent with when the curtain typically rises on the live performances. To my knowledge, SCPR has not previously received a complaint or inquiry from the FC regarding its LA Theater Works broadcasts. In 2004, however, SCPR broadcast on KPCC LA Theater Works' production of the Tony Award-winning play "Dinah Was," about music legend Dinah Washington. Not surprisingly, given Ms. Washington's life and times, the play contains various commonplace "swear" words and sexual expressions. As a result of the ongoing, heightened FCC enforcement activity, and the introduction of an earlier version of the legislation that has now been enacted as the BDEA, SCPR felt it had no choice but to temporarily remove the LA Theater Works broadcasts from the air until it could evaluate ways to minimize future broadcast of any potentially objectionable language. Having concluded that it is neither appropriate nor feasible to edit the performances for language, and because the contemporary playwrights showcased by LA Theater Works often use language that the FCC has indicated it would find sanctionable, SCPR has reluctantly moved the LA Theater Works broadcasts to begin at 10:00 p.m., in the FCC's so-called "safe harbor." Unfortunately, both SCPR and LA Theater Works have

concluded that broadcasts at this late hour will attract only a fraction of the former audience for this series of outstanding theatrical events. Furthermore, although SCPR never found it necessary to devote the staff time to screening the serious and well-regarded plays produced by LA Theater Works prior to broadcast, in the current legal and regulatory environment, SCPR has no choice but to perform a full legal review of each such script, at no small additional cost to the station.

9. The FCC's heightened enforcement regime likewise has and will continue to affect MPR/APM's decisions regarding news coverage. For example, MPR/APM has in the past had a practice of broadcasting comments from a range of citizens on controversial topics of public concern. Experience teaches, however, that mild profanity is commonly used by a large number of average adults, and that such profanity is particularly common as a means of expression in certain demographic groups. MPR's news division has found it necessary to engage in serious discussions about whether current regulations would permit it to broadcast a reference by one citizen to "kicking the President's ass," in the context of a critique of the current Administration. Depending on whether and to what extent the FCC makes good on what MPR/APM understands to be its pledge to investigate each complaint it receives about such language, MPR/APM may have to forego broadcast of such citizen opinions altogether, change the way it gathers and selects them for broadcast, or avoid interviewing persons likely to employ such words in their commentary. MPR/APM views each of these alternatives as unacceptable and a disservice to its listeners. But the threat of bankrupting fines or license revocation can make the otherwise unacceptable essential.

10. Four years ago, MPR/APM produced and distributed a documentary called "The Sonic Memorial Project," which chronicled the sounds and voices of the World Trade Center and its surrounding neighborhood. The documentary was broadcast on MPR stations and dozens of other public radio stations around the country. First aired on September 10, 2002, the program went on to receive the prestigious Peabody Award in 2003. The original broadcast included a poem by a Hilary North, who had survived the attacks, as follows:

> PAUL AUSTER (narrator): Hilary North worked at the Aon Corporation on the 103rd floor of Two World Trade Center. Hilary wrote this poem.
>
> HILARY NORTH: OK. The poem is called 'How My Life Has Changed.'
>
> I can no longer flirt with Lou.
>
> I can no longer dance with Myra.
>
> I can no longer eat brownies with Suzanne Y.
>
> I can no longer meet the deadline with Mark.
>
> I can no longer talk to George about his daughter.
>
> I can no longer drink coffee with Rich.
>
> I can no longer make a good impression on Chris.
>
> I can no longer smile at Paul.
>
> I can no longer hold the door open for Tony.
>
> I can no longer confide in Lisa.

I can no longer complain about Gary.

I can no longer work on a project with Donna R.

I can no longer get to know Yolanda.

I can no longer call the client with Nick.

I can no longer contribute to the book drive organized by Karen.

I can no longer hang out with Millie.

I can no longer give career advice to Suzanne P.

I can no longer laugh with Donna G.

I can no longer watch Mary Ellen cut through the bullshit.

I can no longer drink beer with Paul.

I can no longer have a meeting with Dave W.

I can no longer leave a message with Andrea.

I can no longer gossip with Anna.

I can no longer run in to Dave P. at the vending machine.

I can no longer call Steve about my computer.

I can no longer compliment Lorenzo.

I can no longer hear Herman's voice.

> I can no longer see the incredible view from the 103rd floor.
>
> I can no longer take my life for granted.

This poem, including its reference to "watch[ing] Mary Ellen cut through the bullshit," was included in the broadcast in unedited form in 2002. When this program was rebroadcast on September 8, 2006, however, APM reluctantly felt that it had no choice but to alert its affiliates and to "bleep" this word out of Ms. North's poem for fear that a complaint to the FCC might result in the imposition of substantial fines. One affiliate e-mailed us to convey that it "appreciate[d] the redistribution of the program for a powerful con memorative event for 9/11," but also complained that, by not warning the affiliate of this language early enough in its view, it potentially subjected the affiliate to fines as well:

> Given the FCC's explicit ruling on that particular word and its derivatives . . . we would have hoped the producers would have identified this earlier before redistribution of this program.
>
> It's a sad commentary indeed that we have to worry about such things, but we can't be a test case.
>
> . . . Our broadcast version will include our best attempt at an edit to keep ourselves clear from a potential complaint.

And, thus, Ms. North's memorial to her colleagues was truncated for fear of government sanction, even though the original broadcast had aired without complaint.

11. Two additional recent examples further illustrate this point. The issue of the use of expletives in

news reports arose just last week in coverage of the shooting rampage at in Montreal, Quebec at Dawson College, a school for students between high school and college. APM distributes a current affairs program produced by the Canadian Broadcasting Corporation ("CBC") called "As It Happens," For more than 35 years, "As It Happens" has explored the heart of current events by talking to participants by telephone. On the day of the Dawson College shooting, the "As It Happens" program began with an interview of a 17-year-old student named Zachary Boucher, who had two friends shot in the rampage, one of them standing nearby him at the time as he crouched behind a car. In describing the day's events on the air for almost five minutes, he used the word "fuck" several times and the word "bullshit" once. He otherwise provided a thoughtful, first-hand perspective from a student on the scene well before most American media had arrived. As Canadian broadcasters are not subject to the same strict enforcement regime as their U.S. counterparts, the CBC aired the interview with Boucher in tact. APM, however, "bleeped" these words before distributing the program to U.S. stations and their listeners. Still, to further minimize its risk (for example, based on a fear that the "edited" version was not sufficiently well edited to satisfy the FCC) our sister organization, SCPR, elected not to air the broadcast at all on KPCC and instead broadcast different news coverage during that portion of "As It Happens."

12. On July 17, 2006, during the closing lunch at the Group of Eight summit, President Bush, unaware that microphones were still on, expressed to British Prime Minister Tony Blair frustration that the United Nations had been unable to deter Hezbollah and its backers in Syria from continued attacks on Israel: "See the irony

is that what they need to do is get Syria to get Hezbollah to stop doing this shit and it's over." National Public Radio's program *All Things Considered*, which MPR stations air, included the full unedited audio of President Bush's use of the word "shit." Substantive commentary by the President to another world leader about war in the Middle East is, despite its use of a word that the FCC would otherwise consider to be "indecent" and "profane," clearly something that our listeners as citizens ought to be able to hear in the words the President actually used. However, airing this newsworthy report potentially subjected each of our stations to a $325,000 fine. MPR should not be forced to face the choice between reporting conversations between our President and other world leaders in an unvarnished fashion or risking huge fines or license revocation.

13. Similarly, MPR's news division has also been forced to address whether and to what extent, in the current legal and regulatory environment, we can safely broadcast interviews of and documentaries concerning drug abusers, prisoners, and even teenagers generally, given the propensity of persons in each of these groups to use language that other people may consider "indecent" or "profane." Yet, MPR cannot, on the one hand, purport to be providing an accurate profile or portrayal of such individuals and, on the other hand, coerce those individuals into changing their speech patterns and avoiding what, for them, is customary vocabulary, before MPR turns on its microphones.

14. Likewise, MPR/APM staff members have been forced to address the potential legal ramifications of broadcasting from venues where music is playing in the background of the event, since such music may contain

words that the FCC deems "indecent" or "profane." This issue arises in, among other contexts, political reporting, when correspondents reach out to interview members of certain demographic groups gathered in bars that feature music with lyrics that may run afoul of the law, or at gatherings where such music is playing.

15. Similarly, music programming at MPR has also suffered. We have an internal policy about profanity, indecency, vulgarity and blasphemy. However, our concerns are very much heightened due to the current regulatory environment, especially on our contemporary music service. Facing such large potential fines from the FCC, we have each new song reviewed by two people before it can be aired and, as a result, our process for getting new music on the air is incredibly slow and it is hard for us to remain timely. This process of having two people review each song has added considerable additional cost to our operations. Our production staff finds it difficult to know what to edit since there is no list of what is acceptable and what is not. In general, our staff is terrified that it will make a mistake and play something that might subject us to fines. This means that they take fewer chances and that fewer songs are aired in the unedited form in which the artists created them—and in which, in our experience, most listeners want to hear them.

16. Even MPR/APM's coverage of significant historical events can be compromised by the current enforcement of the "indecency" and "profanity" regulations. A documentary produced by MPR/APM in late 2003, titled "The President Calling," was based on and included excerpts from the White House telephone tapes of, among others, President Richard Nixon. Observing that Presi-

dent Nixon was elected on a platform that called for restoring "decency" to the White House, the report explores the conflict between Mr. Nixon's beliefs and his behavior as president, chronicling the "real" Nixon as he conducted business from the Oval Office. Thus, the report included recordings of President Nixon talking to government officials using such phrases as, "I don't like the son of a bitch," and "do that right away or goddammit I'll fire this whole fucking staff, do you understand that?" President Nixon's use of this language, in the Oval Office and for official business, is precisely the point of the documentary. Under the current state of the law, and particularly in light of the enhanced penalties provided in the BDEA, however, MPR/APM is unsure whether it or any other public radio station could safely re-broadcast this documentary without editing *out* the precise words that illustrate the documentary's point. It would be far too easy for someone who disagrees with the documentary's point of view to file a complaint with the FCC, at a minimum potentially provoking a costly Letter of Inquiry and, at worst, subjecting stations airing it to crippling sanctions. And without any meaningful guidance as to which way the FCC will go, MPR/APM could not take that risk.

17. The recent proceedings at the FCC have made clear that it will likely impose fines or even license forfeiture for each utterance of the word "fuck" and "shit." While the FCC has attempted to suggest in its *Saving Private Ryan* order that such words might be acceptable in certain contexts, the Omnibus Order—particularly its finding that similar language used in a Martin Scorsese documentary about blues musicians was "indecent" and "profane," *see* Omnibus Order ¶¶ 72-86—leaves us unable to predict in any meaningful way

whether language used in our programming will be deemed to run afoul of the FCC's rules and will subject our stations and affiliates to fines, or worse. This uncertainty has itself caused MPR/APM to make changes in its programming to protect itself from censure, because the price of guessing incorrectly has changed dramatically over the past two years, and all the more so with enactment of the BDEA. Those extraordinary fines, coupled with the FCC's avowed determination to punish every utterance that its staff or commissioners determine is "indecent" or "profane," means that MPR and the stations that broadcast its programming will have to avoid words and topics that are even potentially sanctionable. This need to stay far clear of the uncertain prohibited zone has and will continue to prevent MPR/APM from fulfilling its mission of serving the news and entertainment needs of the communities in which it operates. MPR/APM quite literally cannot afford the price of being wrong, even once.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: St. Paul, Minnesota
September 20, 2006

/s/ THOMAS J. KIGIN
THOMAS J. KIGIN

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

No. FCC 06-17

IN THE MATTER OF
COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005; COURT REMAND OF SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 OMNIBUS ORDER RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

I, GARRISON KEILLOR, do hereby declare as follows:

1. I am a radio broadcaster and, among other broadcasting-related activities, I am the originator and host of the public radio program, "A Prairie Home Companion," a chronicle of life in Lake Wobegon, Minnesota. I make this Declaration in response to the recent Public Notice in the above-captioned matter, *FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006) ("*Public Notice*"). Except to the extent expressly indicated to the contrary, this Declaration is made upon my own personal knowledge and/or records maintained in the ordinary course of business and I would be competent to testify to the facts set forth herein.

2. As those who have listened to "A Prairie Home Companion" know, Lake Wobegon is a town of two-thousand souls in central Minnesota, predominantly Norwegian Lutheran and German Catholic, set amidst rolling hills on the edge of the great prairie, marked by a water tower and a grain elevator and the steeple of Our Lady of Perpetual Responsibility. For thirty years, I've told stories on the radio about its inhabitants and their ordinary lives, stories that for some reason radio listeners have been amused or comforted or moved by. Very often, as I tell them, I am aware of censoring myself, omitting detail, drawing a curtain, which I do because radio is an intimate medium and I don't want to offend people, and I am my parents' son, but even so, some people are sometimes deeply offended by what I say or how I say it. Tastes vary. For example, some people bridle at any reference to bodily functions. In Lake Wobegon, people's bodies function pretty much the same as everywhere else. Sometimes these things are of interest. I work out these questions on the spot, by intuition and conscience, and if I offend people, then my radio show pays the price for it in the sense that those who are offended tune the program out. Nobody is seriously injured. That, it seems to me, is the most effective sanction for the broadcast of "inappropriate" material, and the only one consistent with the freedom of speech (and conscience) to which all citizens are entitled.

3. Indeed, as a creator of radio programming, most of which is produced in front of a live audience, it is essential that I be respectful of and responsive to my listeners. But it is equally essential that I be true to the realities of the life experiences on which I draw for the stories I tell, which if not always about "real" people, are always about how people really are. And that includes,

from time to time and in ways I consider appropriate, discussing the kinds of things that really happen to people, and the words they really use to describe them.

4. As someone who aspires to be a responsible broadcaster, however, I am obliged to keep in mind the limits that the government at least claims it is entitled to impose on the content of my programs (which for the most part are carried on broadcast radio, not cable or satellite channels), not least because I have no desire to put the licenses or funds of the stations that carry my programs at risk. In this regard, the FCC's unprecedented construction and enforcement, beginning in 2004, of the statutes that prohibits the broadcast of "indecency" and "profanity" have had and continue to have a substantial negative impact on the my programming. Beginning in early 2004, the FCC's expanded definitions of these terms and its determination to apply the maximum fines to violators have caused me to engage in self-censorship in the production of "A Prairie Home Companion" for fear of being exposed to or exposing the stations that carry the program to severe financial and legal penalties. This is particularly so given what I understand to be a determination by the FCC to sanction even isolated or fleeting broadcast of even a single word falling within its almost unbounded definitions of "indecent" or "profane." The passage of the Broadcast Decency Enforcement Act of 2006 ("BDEA"), with its greatly increased financial penalties, substantially exacerbates this incentive to self-censor.

5. Put simply these legal developments of necessity influence the way that the radio stations that broadcast my programs evaluate my choice of material. And the prospect of that evaluation of necessity influences the

material I choose. I understand that some people, including, apparently, a substantial number of FCC commissioners and at least some congressmen, think that is a good thing. I am not so sanguine that the commissioners or congressmen, or their respective staff members, are better judges of what is suitable material for broadcast than are my listeners. By way of one example, attached to this Declaration as Exhibit A is an exchange of email messages between the management of a Texas station that broadcasts "A Prairie Home Companion" and a listener who was complaining about that station's "censorship" of the November 6, 2004 installment of the program for fear of FCC sanction. The listener forwarded the email exchange to my attention. Apparently, the station was threatened with complaints to the FCC for the broadcast of indecency or profanity because of a joke I told about whether born-again Christians should have the right to vote, since, as the punch-line goes, "being born again, they are no longer citizens of this country, but of heaven." Given the various definitions the FCC has said it will give to the term "profanity," which continue to change over time and which remain unclear, the station's fear of sanction presumably had been increased manifold. That means I need to think twice or three times about telling such jokes, no matter how astute an observation on our political culture I may think them, since I owe it to the stations that carry my program not to get them in trouble with the FCC if I can avoid it.

6. By way of another example, during the first week of April 2005, I broadcast a monologue that led to complaints. Now, I receive complaints about what I say an the radio from time to time, from people who disagree with positions I have taken or views I have expressed,

and this is their right and I am glad they write to me about it. But these complaints were about words I used, not the message I was sending. Attached to this Declaration as Exhibit B is the script for that monologue as it was broadcast. In the monologue I used the word "nigger" and the phrase "son of a bitch." These words are always crude, and sometimes wrong to use, but in the story I was telling, they had their place. I used them deliberately because they established clearly and concisely, the character of the person I was talking about—he was the kind of man who would use the word "nigger" to describe a Black American, and he was the kind of man that other people would call a "son of a bitch." That's exactly how the people of Lake Wobegon would talk about this man, and so did I. And in context, I think any reasonable adult would understand why. But a station called to complain that I was putting its money and its license at risk by using these words. I can't say whether the FCC would actually fine a station for broadcasting my monologue (indeed, the lawyers my colleagues and I asked about it told me they can't figure out the answer either, given the ambiguity of the law against indecent and profane radio broadcasts). But, what I can say is that this station told me clearly that *it* is afraid it will be fined, and so it has doubts about whether it should broadcast my monologue. The station that complained was nice enough to say that it "doesn't want to stifle my creativity," but that it "wants me to be aware of the changed environment for stations." That "changed environment" means censorship, pure and simple, every bit as much as if the government were doing it directly, rather than indirectly through sky-high fines and aggressive posturing.

7. Speaking for myself, I think it might well be impossible to work under stricter government regulation of my speech in regard to "indecency" or "profanity." It's hard enough to tell good stories well, without having to worry about what the government thinks of them. A law like the BDEA and the definitions the FCC is giving to the legal terms, that seek to impose more onerous burdens of "decency" on broadcasters than has been the case for my entire career in radio, would drive me crazy, plain and simple. As I said, some people might think that is a good thing. From where I sit, however, it seems to me such regulation will only serve to further limit the breadth of material available to listeners, and to reduce me to telling stories fit only for children. Stories for children are good things, but adults need stories, too

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: Minneapolis, Minnesota
September *19*, 2006

/s/ GARRISON KEILLOR
GARRISON KEILLOR

From: Stewart Jacoby [mailto:stewartjacoby@kedt.org]
Sent: Tuesday, November 09, 2004 10:20 AM
To: James B. Stewart
Subject: RE: Prairie Home Companion

I appreciate your comments very much. We are not censoring the program in any way. The live program always airs intact. In fact, this is the only occasion in which a decision was made not to air the encore due to content. If no one had called in to complain there wouldn't have been a problem. You may have heard on the news several weeks ago, that the FCC fined a number of television stations across the country for carrying a program with material deemed to be indecent. The FCC admonished the local stations for not taking the initiative to censor the program, when they knew in advance the type of material contained in the program. I'm sure they'll appeal, but they have a whole lot more money for court battles than we do.

I hope you'll understand that our announcer was simply being cautious. He said some of the callers were rude and angry. When you're on the receiving end of those calls, it can have an affect on you. He didn't want to open himself up to receiving more such calls the following day, so that certainly had an impact on his decision. I was tied up over the weekend and he was unable to reach me. Had he reached me I might have come up with a different solution. I'm certain we're being overly cautious, and am very hopeful that the FCC comes up with fairer solutions on the decency issue. I'm sure you'll agree that what might be indecent to one listener, will not be to another. As far as censoring the program

one other time, I can't recall the incident you're speaking of. Please refresh my memory.

Finally, we receive a number of complaints on the content of A Prairie Home Companion on a regular basis. I believe it could be one of the reasons why financial support for the program has fallen off dramatically. During our pledge drive two weeks ago, I had a telephone conversation with one of our patrons who has pulled his support from our station because of the content of APHC and Whad 'Ya Know. So, we get it from both sides of the coin. The difference between commercial and public radio, however, is money. If someone is not happy with something they hear on commercial radio, they simply change to another frequency. If they're not happy with something they hear on public radio, they pull their money and no longer support us. If everyone did that, we would not be able to broadcast. So, we are constantly maintaining a delicate balance in an effort to keep the majority of our supporters happy and satisfied with our programming efforts.

Again, I really appreciate your comments. I know my e-mail is somewhat lengthy, but I feel you deserve an honest explanation. Thank you again. And, thanks for listening.

Best regards,

Stewart

------Original Message------
From: James B. Stewart [mailto:jbstew@cox-internet.com]
Sent: Monday, November 08, 2004 8:56 PM
To: stewartjacoby@kedt.org
Subject: RE: Prairie Home Companion

Mr Jacoby,

Thanks for the explanation. I find it difficult to believe the FCC would discipline or fine one individual public radio station in the country when others have aired the same program without fine or sanction. However if you truly feel that KEDT would be singled out for that sort of treatment based an "official complaint", then I understand your thinking. I don't agree with it, but I understand it.

What I would truly hate to think is that you chose to censor the program because a few cranks called in and whined and likely threatened to not renew their membership. Frankly I am very disappointed you did not run the program on Sunday. Since your station has a history of having censored Keillor on another occasion, it does make one wonder.

Sincerely,

James Stewart

From: Ludie Litz [mailto:ludielitz@kedt.org]
Sent: Monday, November 08, 2004 4:07 PM
To: jbstew@cox-internet.com
Subject: FW: Prairie Home Companion

------Original Message------
From: Stewart Jacoby (mailto:stewartjacoby@kedt.org]
Sent: Monday, November 08, 2004 3:43 PM
To: Ludie Litz
Subject: RE: Prairie Home Companion

Mr. Stewart:

Thanks very much for your e-mail. If you are talking about the Sunday encore of Saturday evening's broadcast, I discussed it with our weekend announcer. During Saturday evening's live performance, our announcer said he received over a half dozen phone calls from listeners complaining about some of the content of the program. The callers complained that some of the jokes, and I guess one in particular, was inappropriate—perhaps even indecent. Because of the complaints, he made the decision not to carry the Sunday encore.

The problem is basically this: According to recent FCC regulations and rulings, Mr. Keillor alone is responsible for the content of his show when it's broadcast live, but because the show's encore is recorded locally for playback on Sunday, we can also be disciplined and subject to fines if someone files an official complaint. Our announcer's actions were entirely appropriate under the circumstances. Please contact me if you have any more questions or concerns. Thanks again for your e-mail.

Best regards,

Stewart Jacoby
Director of Radio Programming

------Original Message------
From: Ludie Litz [mailto:ludielitz@kedt.org]
Sent: Monday, November 08, 2004 1:54 PM
To: Stewart Jacoby
Subject: FW: Prairie Home Companion

------Original Message------

From: James B. Stewart [mailto:jbstew@cox-internet.com]
Sent: Monday, November 08,20041:37 PM
To: ludielitz@kedt.org
Subject: Prairie Home Companion

I was driving home from San Antonio this afternoon listening to 89.1 and caught the Nov. 6 Prairie Home Companion. I called my wife and suggested she might want to tune in at 4 p.m. to KEDT and listen to it . When I got in range I discovered you were not airing in Nov. show. Is there a reason why you did not broadcast the show?

James

Exhibit B

It has been a quiet week in Lake Wobegon. Easter came and went and all of the brass players for miles around were employed, some of the good trumpet players worked three and four services, playing "Jesus Christ is Risen Today" for the Methodists and then driving twenty miles to do it for the Lutherans and then off to do the Presbyterians and the Catholics. It is spring at last and the snow is almost gone, thanks to the big thunderstorm we go this week, and now the air smells like moss. Kites are out and Frisbees. The crocuses are coming up. Daylight Savings Time is here on Sunday. The snowbirds are coming back from Florida, bringing back seashells, which we already have enough of, but if you don't collect seashells, how would you know you were in Florida? The squirrels are tearing around and people on bicycles and geese are flying in and people are starting to sleep with their windows open and in the morning they're awakened by songbirds in the trees. The first ants have been seen. Not the ones who make the potato salad but the kind who go around with loads a hundred times their body weight. Though some of your aunts were strong women, and if you had their potato salad to eat every day, you'd increase your body weight a hundred times. There are blackbirds in town and mourning doves. Mourning with a u. Not morning, as in Monday morning, but mourning, grief. The doves are attending a funeral and making the appropriate soft sobbing sounds.

We've thought about death this week, as we've watched Pope John Paul II dying, preparing to be received into heaven, and as we've waited for that shy sweet lovely young woman in Florida to be ushered to her eternal reward, a woman whose own life and personality and will

was almost completely obscured by the lunatics who gathered around her these past few months. Theresa Marie, may the Lord gather her into His Presence and may eternal light shine upon her. And to my descendants—who may be in charge of me someday, don't wait that long, please. Or I will hang around your house afterwards and rattle your cupboard doors late at night and give you bad dreams.

There are people in the world, and I sort of envy them, who seem to live entirely in the present, but back where I come from, the dead stay with us, they never leave entirely.

I went to my cousin's house in Lake Wobegon and spent the night and I was not alone in that bedroom. There was a woman lying in the bed. She was waiting for her husband. She was waiting and she was naked in the bed and sometimes she'd get up to go to the window and look for him. I could feel her agitation. And then he came in the room, very quietly. She lay quietly in bed. He lay down with his clothes on and he smelled of whiskey. She lay naked next to him. They lay together, breathing softly, not speaking. So much I wanted to say to them, but it was years too late.

My address book I have tried over and over to bring it up to date, there are so many dead people in there, so many phone numbers I used to know by heart and if it called them now, a stranger would answer. But I haven't been able to. Whenever I come to New York, I bring a number of ghosts with me, my father always comes—he was stationed in New York during the war, he was billeted in a hotel in Soho and he marched with his squad of postal clerks up Broadway to the Post Office where they sorted

mail going over to the troops in Europe. So he comes along, and various other aunts and uncles and my cousin Roger who drowned when he was 17 but who enjoys the city. I went to a restaurant for dinner last night, just me, but I thought of Roger. I had the sea scallops. In Lake Wobegon in 1956 when he died, we didn't have sea scallops. He would've liked them, so I enjoyed them even more in his behalf.

Of course it limits the sorts of things you can do in New York when you have these ghostly Sanctified Brethren walking along beside you. So they don't go into the movie theater with me. They wait outside. They've never gone to the opera with me. But they enjoy the parks and seeing the sights. My ghosts are not disapproving or censorious, even the ones who were in life: they seem benevolent to me. At least they don't bother to comment on what I'm doing. They just watch.

Not so with all ghosts. Daryl Tollerud's dad died years ago and he left a lot of anger behind that still troubles them. He was a farmer and all I remember about him is that he drove fast. You'd see him go by on a summer day, a cloud of dust behind him, going eighty miles an hour down a gravel road. Sometimes you could hear him go by in the night. He had about six busted power mowers in his garage, busted because he got mad at them for not starting and he yanked the rope so hard it broke the crankshaft or he'd kick it. His pickup had big dents in the side where he kicked it.

His wife died of cancer when she was 72. She went down rather gracefully, with very little complaining—insisted that she didn't want to be a burden to her family, so she went to the Good Shepherd Home and sat in a sunny cor-

ner and read from the Psalms and had her chicken soup and faded away.

The old man was a handful. He got even angrier after she died. Threw away her stuff, her clothes, her books, her dishes, just threw it away, didn't take it to the Goodwill, or offer it to the children—he burned it and buried it. And then he settled into his cantankerous old age. He was somebody who when he came in to the Chatterbox Cafe for coffee, he always sat alone and you were glad he did. And after a few years he had a stroke. He was furious. It meant he couldn't walk. Couldn't or refused to walk with a limp. He lost the use of his right arm, pretty much. He couldn't speak very well, so he sat and fumed. Daryl did everything he could for his dad and put in ramps for a wheelchair and an electric lift so he could get in and out of bed and a new toilet with a handrail and a shower and opened up doorways so he could wheel around, and the old man came home and looked around and he said, "You're trying to kill me." They hired a young Filipino woman to come and care for him. "I don't want nigger women in my house," he said.

"Then you'll have to go back to the nursing home."

He sat and cursed them all in turn, and when Mari came, he refused to speak to her. But she was good to him. She was a saint. She worked out there seven days a week and did everything and her only time off was for Sunday morning mass. And then over a few months time, he became friends with her and refused to speak to his children. There were rumors that he and Mari were lovers. His children came to visit him for Christmas and he sat in his wheelchair, his big fierce eyebrows, glowering at them, and after an hour they left. He said, "Good.

I have no children. The only one who understands me is her"—and he pointed to Mari and his eyes filled with tears. "She's the only one."

He died in his sleep that spring. One morning he simply was gone. He had rewritten his will and left everything to Mari, the farm, the bank account, everything. His will was full of accusations against his children. Mari was a good woman and after the funeral she went to Father Wilmer and said, "This farm isn't mine, I can't accept it." And she signed it back to the children and left town with a check for a few thousand dollars, and that was that.

Except it wasn't. He is still there. Roaming around. You can feel his presence. In the pasture, the Holsteins lie grazing peacefully, and then, one by one, they get anxious and clamber to their feet and edge away—and you know, he's walked down there and he's yelling at them. They've had more car problems at the Tolleruds, more appliance problems—because the old man's ghost walks in and kicks the clothes dryer, opens up the hood of the car and he's angry because he doesn't understand how to fix it so he busts it. He did some good in the world: two of his daughters became therapists, motivated in some part by the fact that he was a son of a bitch. Their choice was between therapy and a life of psychopathic crime and they chose therapy.

I am grateful for my ghosts who are good people, slow to anger, patient, they keep their voices low. They were farmers who worked with horses and cows and so they make no sudden movements. You don't shout at cows, and you don't reason with them. You control them by closing off all other avenues except the one you want them to go, and then you get their attention by hitting

them in a place where it does no harm, and then you lean on them. And they go. Sometimes I feel as if my ghosts are doing this with me.

There was so much anger surrounding the gentle woman dying in Florida, a sort of flamboyant anger I remember hearing in some preachers when I was a child—an anger that makes a person grateful for the slight advances of civility in our time—certain things that were sins now considered illnesses—alcoholism, for example, taken out of the hands of preachers and given to therapists, which somewhat reduced the level of cruelty and probably is more in keeping with the spirit of the Gospels.

Here is to the gentle and the soft-spoken and the patient, wherever they are. May they wait patiently for their triumph, knowing it will come in good time.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON. D.C. 20554

No. FCC 06-17

IN THE MATTER OF
COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005; COURT REMAND OF SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 OMNIBUS ORDER RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

I, STANLEY A. ("BUD") WILKINSON, JR., do hereby declare as follows:

1. I am the sole proprietor of Broadway's Biggest Hits, a Connecticut-based business. I am also the host and executive producer of the syndicated radio program *Broadway's Biggest Hits.* I make this Declaration in response to recent Public Notice in the above-captioned matter, *FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints,* DA 06-1739 (rel. Sept. 7, 2006) (*"Public Notice"*). Except to the extent expressly indicated to the contrary, this Declaration is made upon my own personal knowledge and/or records maintained by *Broadway's Biggest Hits* in the ordinary course of its business and I would be competent to testify to these facts.

2. A true and correct copy of my professional biography is attached hereto as Exhibit A. As it illustrates, I have substantial experience as a print and broadcast journalist.

3. Since October 1998,the syndicated radio program *Broadway's Biggest Hits* has been pleasing tens of thousands of listeners in the U.S. and Canada each weekend by serving up "The Best of Broadway"—familiar songs from current and past musicals and interviews with well-known Broadway performers, composers and producers.

4. More than 150,000 listeners from coast-to-coast tune in for two hours on a lineup of stations that includes KIXI in Seattle, KOY in Phoenix, KEZW in Denver, WOKY in Milwaukee, WMLB in Atlanta, WZEZ in Richmond, AM 740 in Toronto and dozens more.

5. In marketing the program to potential affiliates, *Broadway's Biggest Hits* is described as "a radio program that happens to play Broadway music" as opposed to "a Broadway show on radio." It is designed to generate the largest possible audience and always takes into account the comfort level of listeners and the makeup of the target audience. While attracting listeners of all ages, *Broadway's Biggest Hits* appeals primarily to educated, affluent listeners, who love Broadway show tunes and who know the content of the musicals and the context of the specific songs. Rarely do they complain about material presented in the show.

6. What was acceptable for airplay, though, has changed dramatically over the past couple of years. Popular songs that were long enjoyed by listeners began to be considered improper by affiliates, who have become increasingly fearful of Federal Communications Commission fines.

7. The result is that listeners have been deprived of some classic songs—songs that relate in important ways to our cultural heritage, and thus to our views of ourselves as Americans. Indeed, even a program as "mainstream" as *Broadway's Biggest Hits* has been forced to rethink what it can broadcast without fear that the carrying stations will incur a government investigation (and the costs that even a Letter of Inquiry from the FCC can impose) or substantial fines, or will have negative comments placed in their license renewal files. Self-censorship—as opposed to mere radio professionalism—is occurring at *Broadway's Biggest Hits,* and I assume at other equally well-regarded and heretofore innocuous programs—despite the fact that no listener has complained.

8. The first hint of affiliate fear came to my attention on July 27, 2004 when Bob Barnum, program director of Cumulus Media's WFAS in Westchester County, New York, e-mailed to report that parts of the song "Dance: Ten, Looks: Three" from the Tony Award-winning musical "A Chorus Line" (the fourth longest-running show in Broadway history) scheduled to air that coming weekend, were "not appropriate" for broadcast: "I do not wish to be perceived as a prude," Barnum wrote. "I have seen 'A Chorus Line' and loved it from beginning to end. However, . . . ('Dance: Ten, Looks: Three') is unacceptable on our radio station (*especially in the current FCC climate*) and will be edited out for the WFAS-AM broadcast." Barnum added, "Please try not to include such songs in future shows." A true and correct copy of the e-mail from Barnum is attached hereto as Exhibit B.

9. Prior to this, "Dance: Ten, Looks: Three" aired five times between 2001 and the end of 2003 without a

whisper of complaint. The song humorously looks at the advantages of plastic surgery to enhance one's job prospects at theatrical auditions; jokingly (or perhaps not so jokingly) suggesting that improving one's "tits and ass" can change one's life.

10. Upon receiving Barnum's e-mail, I immediately responded in a two-fold manner: I e-mailed all affiliates, alerting them to the situation, and re-produced the segment containing "Dance: Ten, Looks: Three"—replacing it with another song. The e-mail to affiliates read:

> TO: Affiliates
>
> FROM: Bud Wilkinson
>
> Just want to alert you to a song in segment two of Hour Two of this weekend's show that may "push the envelope" and be inappropriate to some of you given the current climate at the FCC, and make you aware that an alternate segment is available.
>
> The song in question is Dance: Ten, Looks: Three from A Chorus Line, the musical about what it's like to be a dancer on Broadway. The song humorously tells of how plastic surgery and improving one's "tits and ass" can improve one's chances for a job. This song has been played many times in the past without a problem or complaint. It's a funny song, complete with context, and most listeners are adults.
>
> However, if you feel it's now inappropriate given the current "chill," be please be aware that an alternate version of the segment without that song is now available at [Internet.ftp.address]. It's in the July 31-Aug. 1 folder and is clearly labeled.

> Needless to say, that song and a few other favorites will be shelved until the climate changes in Washington.

A true and correct copy of my e-mail is attached hereto as Exhibit C.

11. My reason for acting as I did is because my customers are the affiliates, not the listeners. The listeners are the beneficiaries of my product, but the affiliates provide me with access to them. If the affiliates are fearful of the FCC—and they clearly are—well, then I am as well.

12. While most affiliates ultimately felt that "Dance: Ten, Looks: Three" was suitable for airplay, and that their listeners were sufficiently mature to handle the song, a few stations went with the alternate segment. Among those airing the revised version were Clear Channel's KABL in San Francisco and Adventure Radio's WLOW in Savannab/Hilton Head. In detailing why KABL took the safer route, program director Clark Reid simply explained, "They're pretty touchy about that kind of stuff around here right now." In a subsequent e-mail, Reid added, "Frankly, Bud, isn't this the craziest of times? It's like the FCC is handing out scarlet 'As' with a big fine attached." A true and correct copy of Reid's e-mail is attached hereto as Exhibit D.

13. The stations that didn't have a problem with the song were in the majority. Cumulus Media's WINE in Danbury, Connecticut and WPUT in Putnam, New York—only a half-hour drive north of WFAS—aired the program as originally recorded. So did Clear Channel stations KOY in Phoenix and KBLU in Yuma, Arizona, with Susan Nickell of KBLU suggesting that she'd hear

complaints from listeners if she didn't air "Dance: Ten, Looks: Three."

14. Nonetheless, the concerns of the few have now resulted in a full review of the *Broadway's Biggest Hits* playlist, the deletion of some well-known, popular and culturally and musically significant songs, and an "always looking over my shoulder" work atmosphere of second-guessing that continues today in which I either exclude or severely limit (in heavily edited form) the airplay of some classic Broadway songs. Among the songs now banned and/or censored from our playlist airing are "Master of the House" from "Les Miserables," "The King of Broadway" from "The Producers," "She Goes" from "High Fidelity," "Purpose": from "Avenue Q," "Great Big Stuff" from "Dirty Rotten Scoundrels," "The Heat Is On in Saigon" and, ironically, "The American Dream" from" Miss Saigon"—in addition to "Dance: Ten, Looks: Three" from "A Chorus Line." Each of these songs was written and/or composed by noted artists, has been performed countless times on countless stages, and has been sold millions of times over on LPs, tapes and/or CDs. But these songs will no longer be heard (or only heard rarely in severely edited form) on my radio program—despite the fact that not a single listener has ever complained about them, and despite the mature makeup of the *Broadway's Biggest Hits* audience and the context and artistic merit of the individual songs.

15. Unlike songs from other genres—rap, rock or country—a show tune is a part of a complete show. Each song has context and advances the storyline of the musical:

- "Dance: Ten, Looks: Three" suggests what producers and directors look for when casting shows, and does so in a comedic way.

- "Master of the House" from "Les Miz," another song that provides comic relief, has a corrupt innkeeper singing of how he manages to line his pockets while his wife laments, "Master of the house, isn't worth my spit; comforter, philosopher and lifelong shit." Prior to being dropped, "Master of the House" aired unedited 10 times over five years—without complaint. "Les Miserables" is the third longest running show in Broadway history (6,680 performances between May 1987 and May 2003).

- "The King of Broadway" from "The Producers" has the musical's central character, producer Max Bialystock, bemoaning his sagging fortunes and wondering, "Who do you have to fuck to get a break in this town." Prior to being dropped, "The King of Broadway" aired 11 times—without complaint. (It should be noted that only 20 or so songs are presented each week. The show has a policy of not airing the same song more than once every three months, so a song that has aired 11 times constitutes "heavy" airplay.) "The Producers" is arguably the most successful show in Broadway history—the winner of a record 12 Tony Awards. As of April 9, 2006, it had grossed more than $256 million on Broadway alone.

16. Based on my experience, listeners will find the absence of "Dance: Ten, Looks: Three" even more curious as a revival of "A Chorus Line" opens on Broadway

this week. That a radio program showcasing Broadway musicals cannot include an important song from one of the most popular musicals of all time without causing problems for the stations that air the program is contrary to what our country is all about.

17. These and the other dropped songs are all a part of the cultural fabric of the country, but songs from them are now effectively being censored—after the marketplace has already decided that they are not only acceptable for airing, but has warmly embraced them. Indeed, these cuts in the playlist have occurred solely because of the fear engendered by the FCC's current enforcement regime and its vague and confusing interpretation of the laws. Moreover, the "chill" brought about by the FCC has caused a significant change in the work routine at *Broadway's Biggest Hits*. Time formerly devoted to cultivating new affiliates and ad sales now must go to the screening of new releases and reviewing music already in the library—a detriment to the show's bottom line that cannot easily be measured. Put simply, in producing the programming, rather than consider only what the listener might enjoy, I am currently forced to worry about the tolerance level of a few frightened affiliates, and the program suffers because of this. On the radio food chain, *Broadway's Biggest Hits* ranks at the low end. That a small, one-man operator, who is trying to promote Broadway music as an art form and Broadway itself as a tourist destination, should be sidetracked to such a degree suggests to me that the issue has gone too fur.

18. Despite some occasionally saucy words, *Broadway's Biggest Hits* can legitimately be described as a family show. People of all ages do tune in. For a period of time, at least one college teacher that I'm aware of

required that her students in the San Francisco area listen to the program for its educational value. Nowhere else could her students hear from the likes of composer/lyricists Stephen Schwartz ("Wicked," "Pippin," "Godspell"), Fred Ebb ("Cabaret," "Chicago") or Sheldon Harnick ("Fiddler on the Roof"), or stars such as Bernadette Peters, Shirley Jones, Nathan Lane and Antonio Banderas. Broadway music connects generations unlike any other style of music. Unfortunately, there are now some huge gaps in what is becoming a shrinking playlist, and therefore in the cultural connections the music engenders.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: Harwinton, Connecticut
September 19, 2006

/s/ STANLEY A. WILKINSON
STANLEY A. ("BUD") WILKINSON

BROADWAY'S BIGGEST HITS [Logo Omitted]

About Bud Wilkinson . . .

Award-winning print and broadcast journalist Bud Wilkinson hosts the syndicated radio show *Broadway's Biggest Hits* and writes the "Eye on Broadway" and "RIDE-CT" newspaper columns.

Broadway's Biggest Hits airs on approximately 25 stations, including Phoenix's KOY, Seattle's KIXI, Denver's KEZW, Toronto's AM 740/CHWO and Milwaukee's WOKY.

In Connecticut, where the show is based, *Broadway's Biggest Hits* is heard on New Haven's WQUN.

The "Eye on Broadway" column premiered in February 2003 in *The Litchfield County Times* in Connecticut. It takes readers into the dressing rooms of the stars of the biggest Broadway hits and offers the latest Broadway news.

The "RIDE-CT" column premiered in July 2005 in *The Republican American* in Waterbury, CT. It celebrates motorcycling and promotes safe riding.

A Connecticut native, Wilkinson spent more than two decades in high profile media positions in Phoenix, Arizona. He launched *Broadway's Biggest Hits* as a local show on KOY radio in late December 1997. It became an instant ratings success, prompting syndication nine months later.

Prior to creating *Broadway's Biggest Hits*, Wilkinson spent eight years as Entertainment Editor at Fox-owned KSAZ-TV (Chanel 10) and Entertainment Reporter for

news/talk KTAR radio, preceded by 10 years as TV/Radio Columnist for *The Arizona Republic* newspaper.

A graduate of Vermont Academy in Saxtons River, Vermont and Ohio Wesleyan University in Delaware, Ohio, Wilkinson brings an award-winning background in journalism to *Broadway's Biggest Hits* and to the newspaper columns.

Wilkinson was honored with a Scripps Howard Foundation National Journalism Award in 1992 for a series of reports on adult literacy for Channel 10 and received a regional Emmy Award for commentary on Channel 10 that same year. He also won an Arizona Press Club Award for spot news reporting on a hostage situation at a Phoenix TV station in 1982.

During his career he has also written extensively for *Arizona Highways, Phoenix,* (Arizona) *Diamondbacks, Arizona Golf Journal* and *Passport* magazines as well as the entertainment/trade publications *Variety* and *Electronic Media.*

Wilkinson lives in Harwinton, CT and may be reached by phone at 860-485-0700 or by e-mail at either budw@broadwaysbiggesthits.com or budw@ride-ct.com.

Stanley A. ["Bud"] Wilkinson Jr.

227 Whetstone Road
Harwinton, CT 06791

Phone: 860-485-0700 Mobile: 860-922-4201
Email: budw@broadwaysbiggesthits.com

SUMMARY

Experienced print and broadcast journalist with emphasis on entertainment and sports. Extensive reporting for major-market newspapers, TV and radio news organizations as well as magazines.

WORK EXPERIENCE

Executive Producer/Host, *Broadway's Biggest Hits* (1997-Present) Produce and host nationally syndicated weekly radio show. Book and interview guests, maintain contact with PR firms and CD labels, and write content for two-hour program of music and news. Also write and supervise content of BroadwaysBiggestHits.com web site.

Freelance writer (1997-Present)

- "Eye on Broadway" column for *The Litchfield County Times* since February 2003.
- "RIDE-CT motorcycle column for *The Republican-American* (Waterbury, CT) since July 2005
- Contributor of self-generated and assigned stories for *Passport, Arizona Highways,* (Arizona)
- *Diamondbacks, Phoenix* and *Arizona Golf Journal* magazines.

Reporter/Entertainment Editor, *KSAZ*-TV, *Phoenix* (1989-1997)
General assignment reporter with emphasis on entertainment stories for Fox-owned Channel 10. Packages for 6-9 a.m. and 5, 6, 9 and 10 p.m. weekday newscasts with daily live shots. Covered Super Bowl XXX and Grammy Awards in Los Angeles.

Entertainment Editor, news/talk KTAR Radio, Phoenix (1989-1996)
Provided entertainment reports three times daily, including morning and afternoon drive times.

"Off-Ice" Reporter, *Cox Sports/ASPN* (1990-1996)
Provided injury and strategy updates during stoppages in play, plus live intermission and postgame interviews with players and coaches during Phoenix Roadrunners' International Hockey League telecasts on regional cable network.

TV-Radio Columnist, *The Arizona Republic*, Phoenix (1979-1989)
Reported and wrote daily media column for state's largest newspaper, covering both local TV and radio as well as national programming, issues and trends.

Reporter/TV-Radio Writer, *The Columbus (Ohio) Dispatch* (1976-1979)
General assignment "state" reporter for one year covering multi-county area between Columbus and Cleveland before being promoted to TV-Radio column.

Reporter/Sports Writer, The Delaware (Ohio) Gazette (1975-1976)

AWARDS

Scripps Howard Foundation National Journalism Award (1992) for year-long series on adult literacy on Channel 10 in Phoenix.

Rocky Mountain Emmy Award (1991-92) for general commentary on Channel 10.

EDUCATION

Ohio Wesleyan University, Delaware, OH - B.A. in journalism

Vermont Academy, Saxtons River, VT

Bud Wilkinson

From: "Bob Barnum" <bobb@mail.wfasfm.com>
To: <budw@broadwaysbiggesthits.com>
Sent: Tuesday, July 27, 2004 1:42 PM
Subject: This coming weekend's show

Hello Bud,

I do not wish to be perceived as a prude. I have seen "A Chorus Line," and loved it from beginning to end. However, parts of it are not appropriate for on air broadcast. The number "Dance 10, Looks 3" while great for Broadway, is unnacceptable on our radio station (especially in the current FCC climate) and will be edited out for the WFAS-AM broadcast. Please try not to include such songs in future shows.

Bob Barnum
Program Director, WFAS-AM

365 Secor Road
Hartsdale, NY 10530
914-693-2400 ext. 3002

Sent via the WebMail system at mail.wfasfm.com

Sent via the WebMaiI system at mail.wfastm.com

9/15/2004

Bud Wilkinson

From: "Gene Murrell" <murrellhb@yahoo.com>
To: "Bud Wilkinson" <budw@broadwaysbiggesthits.com>
Sent: Thursday, July 29, 2004 1:11 PM
Subject: Re: Broadway's Biggest Hits - Alternate segment for this weekend if necessary

So I guess that means Abie Baby from Hair won't be in the playlist anytime soon . . .

or how about La Vie Boheim from RENT?

The FCC is killing us!

How bout the you can be as loud as you want from ave Q?

Thanks for the heads up,.

-----Bud Wilkinson <budw@broadwaysbiggesthits.com> wrote:

> TO: Affiliates
>
> FROM: Bud Wilkinson
>
> Just want to alert you to a song in segment two of
> Hour Two of this weekend's show that may "push the
> envelope" and be inappropriate to some of you given
> the current climate at the FCC, and make you aware
> that an alternate segment is available.
>
> The song in question is Dance: Ten, Looks: Three
> from A Chorus Line, the musical about what it's like
> to be a dancer on Broadway. The song humorously
> tells of how plastic surgery and improving one's

> ."tits and ass" can improve one's chances for a job.
> This song has been played many times in the past
> without a problem or complaint. It's a funny song,
> complete with context, and most listeners are
> adults.
>
> However, if you feel it's now inappropriate given
> the current "chill," be please be aware that an
> alternate version of the segment without that
> song is now available at ftp://. It's in the
> July 31-Aug. 1 folder and is clearly labeled.
>
> Needless to say, that song and a few other favorites
> will be shelved until the climate changes in
> Washington.
>
> Thanks,
>
> Bud
>
>———————

> Bud Wilkinson
> Broadway's Biggest Hits
> 227 Whetstone Road
> Harwinton, CT 06791
>
> Phone: 860-485-0700
> Cell: 860-922-4201
> www.broadwaysbiggesthits.com

Gene Murrell
Program Director
WLOW-FM
1 St Augustine Pl
Hilton Head Island, SC 29928
(843) 785 9569

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New and Improved Yahoo! Mail-Send 10MB messages!
http://promotions.yahoo.com/new_mail

Bud Wilkinson

From: "Reid, Clark" <clarkreid@clearchannel.com>
To: "Bud Wilkinson" <budw@broadwaysbiggesthits.com>
Sent: Thursday, July 29, 2004 11:04 AM
Subject: RE: Broadway's Biggest Hits - Alternate segment for this weekend if necessary

Thanks, Bud.

They're pretty touchy about that kind of stuff around here right now. (Although personally, I heartily support T&A at every opportunity . . . it's just the spousal support for past T&A I resent!)

CR

------Original Message------

From: Bud Wilkinson [mailto:budw@broadwaysbiggesthits.com
Sent: Thursday, July 29, 2004 7:49 AM
To: Undisclosed-Recipient:;
Subject: Broadway's Biggest Hits - Alternate segment for this weekend if necessary

TO: Affiliates

FROM: Bud Wilkinson

Just want to alert you to a song in segment two of Hour Two of this weekend's show that may "push the envelope" and be inappropriate to some of you given the current climate at the FCC, and make you aware that an alternate segment is available.

The song in question is Dance: Ten, Looks: Three from A Chorus Line, the musical about what it's like to be a dancer on Broadway. The song humorously tells of how plastic surgery and improving one's "tits and ass" can improve one's chances for a job. This song has been played many times in the past without a problem or complaint. It's a funny song, complete with context, and most listeners are adults.

However, if you feel it's now inappropriate given the curent "chill," be please be aware that an alternate version of the segment without that song is now available at ftp://. It's in the July 31-Aug. 1 folder and is clearly labeled.

Needless to say, that song and a few other favorites will be shelved until the climate changes in Washington.

Thanks,

Bud

Bud Wilkinson.
Broadway's Biggest Hits
227 Whetstone Road
Harwinton, CT 06791

Phone: 860-485-0700
Cell: 860-922-4201
www.broadwaysbiggesthits.com

Bud Wilkinson

From: "Reid, Clark" <clarkreid@clearchannel.com>
To: "Bud Wilkinson" <budw@broadwaysbiggesthits.com>
Sent: Wednesday, August 04, 2004 9:26 AM
Subject: RE: Broadway's Biggest Hits - "T&A" follow

Frankly Bud, isn't this the craziest of times?? It's like the FCC is handing out scarlet "As" with a big fine attached.

Thanks for the try on the ink!

C.

------Original Message------
From: Bud Wilkinson [mailto:budw@broadwaysbiggesthits.com]
Sent: Tuesday, August 03, 2004 5:04 AM
To: Reid, Clark
Subject: Broadway's Biggest Hits - "T&A" follow

Clark,

Damn, I tried to get your call letters in the NY Daily News. Here's what was in this morning's newspaper (see below). . .

Kind of interesting how stations treated "Dance: Ten, Looks: Three." As best as I can determine, only WFAS and KABL had a problem with it. Clear Channel's KOY, KBLU and WOKY. The p.d. at KBLU in Yuma said yesterday that her listeners would lynch her if she cut such a well-known and clever song.

Seriously, I didn't have any problem whatsoever providing an alternate segment, and have dropped some

songs from the playlist until the climate at the F.C.C. swings back the other way. Too bad the Chronicle does such a great job of ignoring radio. Maybe we could have gotten KABL a mention there are well, but I didn't even float it.

The NY Daily News column follows.

Bud

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

No. FCC 06-17

IN THE MATTER OF
COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005; COURT REMAND OF SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 OMNIBUS ORDER RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

I, DENNIS FISHER, do hereby declare as follows:

1. I am employed as the News Director of WNEP-TV16 in Moosic, Pennsylvania, and I make this declaration on WNEP-TV16's behalf in response to the recent Public Notice in the above-captioned matter. *FCC Announces Filing Procedures in Connection with Court Remand of Section III B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006) ("*Public Notice*"). Except to the extent expressly indicated to the contrary, this Declaration is made upon my own personal knowledge and/or records maintained by WNEP-TV16 in the ordinary course of its business and I would be competent to testify to the facts set forth herein.

2. WNEP-TV16 is a television station that broadcasts news, locally originated programming and programs distributed by the ABC network to communities

located in Northeastern and Central Pennsylvania. Every weekday, WNEP-TV16 broadcasts 5.5 hours of regularly scheduled live news programs produced by WNEP-TV16, such as the acclaimed *Newswatch* 16, at various times during each weekday, and 4 hours of such programming during each Saturday and Sunday.

3. On March 21, 2004, during one of its regularly scheduled morning news programs, WNEP-TV16 broadcast live news coverage of the demolition of Philadelphia Veterans Stadium, the former home of the Philadelphia Phillies professional baseball team and Philadelphia Eagles professional football team. As the landmark stadium imploded and collapsed to the ground, one of the thousands of spectators who had gathered to observe the implosion yelled out the "F Word" loud enough to be captured in the live telecast.

4. WNEP-TV16, of course, has no way to control what may be said by participants in, or persons observing, live newsworthy events. Nevertheless, under the recently expanded enforcement activity of the FCC and the vaguely worded prohibition against the broadcast of "indecent or profane language," coupled with the dramatically increased fines established by the Broadcast Decency Enforcement Act ("BDEA"), providing live coverage of newsworthy events of interest and importance to the public places WNEP-TV16 under significant risk.

5. To lessen the risk posed by the new legal framework relating to the broadcast of indecent or profane speech, WNEP-TV16 has been forced to change the way in which it covers live events where crowds are present. Among other things, I have directed WNEP-TV16's news staff that WNEP-TV16 may no longer provide live, direct-to-air coverage of these events unless they affect

matters of public safety or convenience. Thus, news coverage by WNEP-TV16 of live events where crowds are present essentially will be limited to civil emergencies.

6. In lieu of live coverage, the heightened legal risks have forced WNEP-TV16 from time to time to transmit videotaped feeds back to the station for review before airing.

7. Before WNEP-TV16 broadcasts videotaped feeds or other news content, WNEP-TV16 personnel review the feeds and other content in an effort to keep from broadcasting language that may be deemed "indecent" or "profane" and thereby expose WNEP-TV16 to substantial legal and financial risks. However, given the vagueness of the terms "indecent" and "profane," it often is difficult to predict whether any given statement may run afoul of the law.

8. Because the severity of the risk to which broadcasters now are exposed, the news department of WNEP-TV16 has been forced to adopt a policy of not broadcasting speech that could be viewed as even close to the line of what may be prohibited. The natural consequence of the FCC's expanded regulation in this area and the passage of the BDEA is that WNEP-TV16, like other broadcasters, will engage in self-censorship and as a result will deprive people in the communities that we serve from receiving certain news and other constitutionally protected information.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: Moosic, Pennsylvania
September *19*, 2006

/s/ DENNIS FISHER
DENNIS FISHER

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

No. FCC 07-16

IN THE MATTER OF
COMPLAINTS REGARDING VARIOUS TELEVISION BROADCASTS BETWEEN FEBRUARY 2, 2002 AND MARCH 8, 2005; COURT REMAND OF SECTION III.B OF THE COMMISSION'S MARCH 15, 2006 OMNIBUS ORDER RESOLVING NUMEROUS BROADCAST TELEVISION INDECENCY COMPLAINTS

I, Robert J. Sikorski, do hereby declare as follows:

1. I am employed as the President of the Niagara Frontier Radio Reading Service, Inc. ("NFRRS") and I make this Declaration on NFRRS' behalf in response to the recent Public Notice in the above-captioned matter, *FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006) ("*Public Notice*"). Except to the extent expressly indicated to the contrary, this Declaration is made upon my own personal knowledge and/or records maintained by NFRRS in the ordinary course of its business and I would be competent to testify to the facts set forth herein at a hearing or trial in this matter.

2. The NFRRS, founded in 1986 is a private 501(c)3 not-for-profit agency with broadcast studios and offices at 1199 Harlem Road, Cheektowaga, New York 14227,

which administers an 'award-winning radio reading service for the blind and print-handicapped residents of the City of Buffalo and Western New York State. Its mailing address is: The Niagara Frontier Radio Reading Service, P.O. Box 575, Buffalo, New York 14225. Its mission has been to "Give the Blind a Chance to Read." As do other radio reading services elsewhere throughout the United States, the NFRRS has radio reading volunteers broadcast daily readings of newspapers, books, magazines, vital community information and other printed matter to blind and print-handicapped persons, who are provided "reading radios," i.e., specially-tuned radio reading receivers. The NFRRS has been regarded as one of the finest radio reading services in the nation, broadcasting readings to those without sight 24 hours a day, every day of the year, to date, the NFRRS has broadcast most than 150,000 hours of radio readings to thousands of very appreciative visually-impaired area listeners. NFRRS' 300 radio reading volunteers broadcast readings of several daily newspapers, more than 50 community newspapers, more than 80 magazines and best-selling books; nearly 3,000 books, listed as "best-sellers" by the New York Times, have been presented by NFRRS radio readers. The agency has won many awards, including the New York State Governor's Eleanor Roosevelt Outstanding Community Service Award, the J.C. Penney Golden Rule Award, the Rudy Spitzer Outstanding Community Achievement Award, many governmental citations for exemplary service and thousands of individual accolades for caring community commitment. The NFRRS has been a finalist for broadcasting's coveted Peabody Award. As in the case of other radio reading services, the NFRRS' primary means of transmission is through the leased subcarrier of a local FM

signal, 102.5 FM at 67mhz, which can be heard on fixed-position SCA receivers distributed to print-handicapped persons by the agency. In addition, for the past 14 years, the NFRRS has also been carried on the Secondary Audio (SAP) Channel of local ABC-TV affiliate WKBW-TV/Channel 7, Buffalo, which has donated its SAP Channel, enabling people with stereo TV's to hear NFRRS readings. The SAP Channel carriage has been invaluable to the agency, not only promoting its existence but serving print-handicapped listeners who cannot be reached by the NFRRS FM-SCA signal. A number of special SAP-audio receivers have been distributed to visually-impaired persons by the NFRRS.

3. The blind and print-handicapped persons served by the NFRRS have been and will continue to be directly and negatively affected by the FCC's heightened enforcement of prohibitions on "indecency" and "profanity" in broadcasting and the Broadcast Decency Enforcement Act's ("BDEA's") heightened penalties for violations of Section 1464.

4. Since the NFRRS first went on-the-air on March 19, 1987, the Niagara Frontier Radio Reading Service for the Blind has had a policy of restricting the readings of best-selling books with adult situations to late-evening hours, i.e., no earlier than 10pm. Disclaimer announcements before such readings note that such readings' may contain adult material and/or situations, and that listener discretion is advised. The Federal Communications Commission has long recognized the worth and unique nature of radio reading services for the blind, even encouraging the at-cost provision of public broadcasting channel space to such services.

5. However, on February 11, 2005, a representative of WKBW-TV called the NFRRS to infonn the agency that WKBW-TV had, without any advance notice to the NFRRS or its listeners, removed the NFRRS from the WKBW SAP Channel. The station had received only a single complaint from one caller about the "adult nature" of a NFRRS program aired the previous evening. Apparently, the program in question was an installment of the current best selling novel "I Am Charlotte Simmons" by acclaimed author Tom Wolfe. Without giving the NFRRS any opportunity to respond, the station took the drastic action after 14 years of carrying NFRRS reading of books, magazines and newspapers. The station representative said that the station could not subject itself to potential heavy fines by the Federal Communications Commission, and that, shockingly, the NFRRS was "done" on WKBW-TV's SAP Channel.

6. The effect of WKBW-TV's removal of the NFRRS from its SAP Channel was staggering to the agency and to the print-handicapped listeners who depended upon the NFRRS. Suddenly, without warning, the NFRRS SAP receivers used by many visually-impaired listeners were worthless. In the two weeks that followed, there was a run on radio reading receivers, as blind people with SAP receivers rushed to exchange their radios for FM-SCA receivers. For the first time in more than a decade, the NFRRS' supply of usable receivers was exhausted. Those print handicapped persons wishing to gain access to printed matter through the NFRRS were unable to obtain a working receiver. Additional receivers will cost the NFRRS more than $90 each and are not available immediately. A particularly cruel note was that the NFRRS became aware that a number of blind people with suddenly non-working radios thought, mistakingly,

that they had somehow broken their radios, and they were hesitant about letting the agency know about their problem. Meanwhile, thousands of people who listened to the NFRRS on their stereo TV were cut off. Sources indicate that WKBW-TV received hundreds of complaint calls about the sudden removal of the NFRRS from WKBW-TV's SAP Channel. The unfortunate action by a broadcast licensee in anticipated fear of possible extreme FCC punishment fines also generated an article in "The Buffalo News," a national Associated Press story carried by many newspapers nationwide, and an Albany, New York newspaper editorial cartoon lampooning the FCC as a giant with a whip posed to strike broadcasters.

7. Two weeks later, WKBW-TV resumed broadcasting the Niagara Frontier Radio Reading Service on the station's SAP Channel—but only during the hours of 6am-10pm each day, to avoid any possibility of the presentation of adult matter during the reading of best-selling books. As a result of a broadcast licensee's fear of FCC punishment, 1/3 of NFRRS readings—nearly 3,000 hours of readings per year—will be lost to SAP Channel listeners. They include many hours of general interest readings, offensive to virtually no one. For example, one of the best-selling books scheduled for 10pm airing—thereby unavailable to NFRRS SAP listeners—is the autobiography of Buffalo Bills Hall of Fame football coach Marv Levy—a book of great general interest to area residents. With 24 hour-a-day readings, it took the NFRRS 17 years to reach 150,000 hours of radio readings to the blind. With the SAP restriction reducing SAP-accessed radio readings by 1/3, it would take 25 years—8 years longer—to reach that milestone.

8. The arbitrary, unfair and inconsistent enforcement actions of the FCC undoubtedly have an unfortu-

nate and perhaps unanticipated chilling effect on those seeking to provide radio readings to the blind, be they broadcast licensees or others. The FCC's willingness to threaten the fining of non-licensees already has concerned a number of volunteer radio readers at the NFRRS. Radio readers to the blind should be praised for their dedication in service to those without sight; they are literally sharing their sight with those who are unable to read the printed matter that most of us take for granted. Instead, the threats imposed by the FCC and BDEA have already frightened radio reading volunteers who give their time, talents and efforts to give the blind a chance to read. They should not face substantial fines for providing radio readings. The FCC has recognized the worth of radio reading services to the blind; it should not threaten to punish those who make radio reading to the blind possible.

9. As a result of the FCC and BDEA intimidation, the Niagara Frontier Radio Reading Service has incurred substantial losses. Its costs include the unanticipated provision of a substantial number of replacement radio reading receivers at about $90 each, as well as the loss of 33% of its broadcast hours on SAP. For the record, WKBW-TV recognized our agency's cost of providing replacement receivers, as it provided a contribution of $100 when it returned the NFRRS to its SAP Channel from 6am until 10pm. The clear unconstitutionality of FCC's stance and the BDEA applicable provisions have and will result in many unfortunate and inappropriate results more than negating any potential positive impact on licensees alike. For the sake of print-handicapped people who depend each day on their radio reading services, and for the sake of well-meaning radio reading

volunteers making genuine profound contributions to our society, the overbearing nature of the FCC and BDEA approach must not be allowed to continue.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: 1199 Harlem Road, Cheektowaga,
New York 14227
September 20, 2006

/s/ ROBERT J. SIKORSKI
Robert J. Sikorski

September 21, 2006 www.televisionwatch.org

William H. Davenport
Chief, Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-C330
Washington, D.C. 20554

Re: Court Remand of Section III.B of the Commission's March 2006 *Omnibus Order* Resolving Numerous Broadcast Indecency Complaints

Dear Mr. Davenport:

In response to the Commission's September 7, 2006 call for comment in connection with the court remand of its March 15, 2006 *Omnibus Order* resolving various indecency complaints, TV Watch respectfully requests that the Commission, taking cognizance of the views of the great majority of Americans, reject the *Omnibus Order's* constitutionally suspect approach to indecency enforcement.[1] Parents, not special interest organizations or the government, should decide what is okay for their families to watch.

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[1] *See FCC Announces Filing Procedures in Connection with Court Remand of Section III.B of the Commission's March 15, 2006* Omnibus Order *Resolving Numerous Broadcast Television Indecency Complaints*, Public Notice, DA 06-1793 (rel. Sept. 7, 2006) (citing *Fox Television Stations, Inc. v. FCC*, No. 06-1760-AG (2d Cir. Sept. 7, 2006) ("*Remand Order*") and *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability & Memorandum Opinion & Order, 21 FCC Rcd 2664 (2006) ("*Omnibus Order*")).

TV Watch is a broad-based coalition that opposes government control of television programming, preferring instead to promote the use of tools like content ratings and parental controls that empower parents to manage their families' television viewing. TV Watch provides a much needed voice to the majority of Americans who prefer personal responsibility to government regulation. TV Watch consists of 27 prominent individuals and organizations that represent more than 4 million Americans. Its diverse membership includes, among others, broadcast networks, the Minority Media & Telecommunications Council, the National Academy of Recording Artists, the US Chamber of Commerce, as well as constitutional scholars and media experts.[2]

The coalition's guiding principles are the following: (1) Americans should determine what is seen and heard in their own homes, based on their personal tastes; and

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[2] Member organizations include: American Conservative Union; Americans for Tax Reform; Black Filmmaker Foundation; CBS; Center for Creative Voices in Media; The Creative Coalition; Center for Democracy and Technology; Media Freedom Project; The Media Institute; Minority Media & Telecommunications Council; National Academy of Recording Artists; NBC Universal; News Corporation; PSVratings; SpeakSpeak; US Chamber of Commerce. Individual members are: Jack Balkin, First Amendment Professor, Yale Law School; Braden Cox, Technology Counsel, Competitive Enterprise Institute; Susan Crawford, Professor, Cardozo Law School; Nick Gillespie, Editor: *Reason Magazine;* Jeff Jarvis, former TV critic for *TV Guide* and *People,* and creator of *Entertainment Weekly* and blogger for Buzzmachine.com; Brian Murphy, Adjunct Professor, New York Law School and partner, Frankfurt Kurnit Klein & Selz; Sal Severe, PhD, and author: *How to Behave So Your Children Will Too;* Adam Thierer, Senior Fellow and Director, Center for Digital Media Freedom at The Progress & Freedom Foundation; Linda Gale White, former First Lady of Texas; Jack Myers, editor and publisher of the *Jack Myers Report, Media Village* and former TV executive.

(2) the television industry should rate programs, advise viewers about the content that they are about to see, as well as promote awareness of the tools and information that allow parents to exercise control at home (through use of the V-Chip, cable and satellite parental controls, television ratings and parental involvement).

The opinions of TV Watch reflect those of most television viewers. While a significant population is concerned about content on television, most say that government regulation is not the answer.[3] "An overwhelming majority of respondents (87%)—including 76% of those who 'often' see objectionable content and 86% of weekly churchgoers—also agree that '*if you don't like what's on television, change the channel, but don't deny everyone else the right to watch what they want to see.*'"[4]

Americans simply do not want the FCC to play parent. For example, a nationwide survey conducted March 24-26, 2006 confirms that the vast majority of television viewers do not want federal regulators in their living rooms. More than three-fourths of voters would be upset if government regulation limited their programming choices.[5] Moreover, fully two-thirds of voters believe that the government should not make subjective decisions about when the use of explicit language is necessary, whether in educational or artistic programming, as

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[3] *See* Luntz Research Companies and Peter D. Hart Research Associates, *National Survey on Decency in Television*, available at http://www.televisionwatch.org/atf/cf/{08411ODD-FDFD-481D-9E6F-755FD08705F2}/Luntz-Hart%20Survey.pdf.

[4] *Id.*

[5] *See* TV Watch Press Release, *Survey: More Likely to Find an Adult Who Believes in Alien Abductions than a Voter who Wants the Feds to Pick What's on TV* (Mar. 29, 2006).

was the case when the FCC reviewed *Saving Private Ryan, The Blues: Fathers and Sons*, and other content as part of the *Omnibus Order*.[6]

Americans understand that not all programming is intended for children. And government regulation is having a direct impact on what we all have the opportunity to watch on television. Television programs are already being changed or not aired at all, out of fear of government fines. The FCC should not censor broadcast programming based upon its own subjective views nor should it impose regulations that will lead to the chilling of speech.[7] It's what Americans don't see that may anger them as government makes decisions about what we all can and can't view.

Television content can be unpredictable at times, especially when it comes to news and live broadcasts. Live television depicts reality and events as they happen spontaneously, whether it be an overly excited fan at a sporting event, or the President of the United States engaging world leaders (as evidenced by President Bush's recent utterance of the S-word in a conversation with British Prime Minister Tony Blair, which was carried by several news organizations). Live television provides a direct link to the world and it should not be censored by the government.

TV Watch strongly encourages the Commission to consider fully the views of the vast majority of Americans and withdraw the *Omnibus Order's* constitutionally

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[6] *Id.*

[7] Government regulation is in fact chilling speech and threatening viewer choice. As the attached Exhibit A makes clear, broadcasters are being forced to edit or drop programs based on fear of FCC indecency enforcement action.

suspect approach to indecency enforcement. Responsibility and education, not more regulation, are the solution to any problem associated with children's television consumption.

Sincerely yours,

/s/ JIM DYKE

JIM DYKE
Executive Director
TV Watch
46-A State Street
Charleston, South Carolina 29401
(843) 722-9670

EXHIBIT A

THE CHILLING EFFECT

You may not know it, but TV programs are already being changed or not aired at all, out of fear of government fines. It's what Americans *don't* see that may anger them.

When CBS decided to rebroadcast the documentary *9/11*, 56 CBS affiliates—covering nearly 11% of US households—either refused to air the show or moved it to the 'safe harbor' out of fear they would be fined for the coarse words uttered by rescuers during the attacks. The program contains the only known footage of the first plane flying into the World Trade Center towers.

In response to 2006 FCC fines against a Martin Scorsese documentary about the blues and out of fear of recently increased fines, PBS has begun instructing its producers to self-censor all of its shows, including news programming like the acclaimed *Frontline*.

Scenes from the previously approved pilot of the WB series *The Bedford Diaries* were later censored by the network, against the wishes of the series director, in light of recent FCC enforcement decisions.

Garrison Keillor's national, daily five-minute poetry and history program was canceled by a Kentucky radio program after the word 'breast' was spoken during a reading. After an outcry from the community, the show was reinstated.

- ABC now alters language and images in the long-running, Emmy Award-winning *N.Y.P.D. Blue* even though the now-edited content has been a staple of the show for over a decade
- Fearing FCC fines, more than 80 percent of PBS affiliates declined to air an unedited version of the *Frontline* documentary "A Company of Soldiers."
- Phoenix TV stations dropped coverage of a live memorial service for Pat Tillman, the former football star killed in Afghanistan, because of language used by mournful family members.

  One third of the country wasn't able to watch *Saving Private Ryan* on Veteran's Day 2004, when stations declined to air it fearing action by the FCC.
- Shows like *Antiques Roadshow* must now screen items for 'indecency,' including such pieces of Americana as famous lithographs of Marilyn Monroe and illustrations of the female form in artwork from World War II bomber planes.
- The FCC investigated NBC's coverage of the Olympic Games Opening Ceremonies in Athens because historical depictions of Greek art and dance appeared in the broadcast.

  For a documentary about South Africa, scenes of Nelson Mandela at a dance event were cut out because some women in the background were partially unclothed, as is the cultural norm in Africa.
- FOX edited testimony in *The Jury* (which examines the jury system) in a program involving child

sexual abuse, even though it went to the crux of the case and the jury's verdict.

In the wake of FCC enforcement decisions, an episode of *That 70s Show* that won an award for its treatment of sexual health in a responsible manner has been shelved for reruns, even though it drew no complaints when it first aired.

80 percent of PBS affiliates rejected broadcast footage from the time leading up to the Iraqi elections and the battle for Fallujah because of explicit language used by the soldiers.

A *Family Guy* episode that aired 5 without incident years ago was later edited to remove a view of an animated character's buttocks. In another episode, an animated depiction in of a character breast-feeding was also altered.

An episode of *ER* was edited to remove a brief shot of the exposed breast of an 80-year-old woman receiving emergency care.

# # #

PETITIONER'S BRIEF

No. 07-582

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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GREGORY G. KATSAS
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Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

Respondents who were petitioners in the court of appeals below are Fox Television Stations, Inc.; CBS Broadcasting Inc.; WLS Television, Inc.; KTRK Television, Inc.; KMBC Hearst-Argyle Television, Inc.; and ABC, Inc.

Respondents who were intervenors in the court of appeals below are NBC Universal, Inc.; NBC Telemundo License Co.; NBC Television Affiliates; FBC Television Affiliates Association; CBS Television Network Affiliates; Center for the Creative Community, Inc., doing business as Center for Creative Voices in Media, Inc.; and ABC Television Affiliates Association.

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In the Supreme Court of the United States

No. 07-582

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 489 F.3d 444. The order of the Federal Communications Commission (Pet. App. 61a-142a) is reported at 21 F.C.C.R. 13,299.

JURISDICTION

The judgment of the court of appeals (Pet. App. 143a-144a) was entered on June 4, 2007. On August 23, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 4, 2007. On September 24, 2007, Justice Ginsburg further extended the time to November 1, 2007, and the petition was filed on that date. The petition for a writ of certiorari was granted on March 17, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory and regulatory provisions are set out in an appendix to the petition for a writ of certiorari. Pet. App. 145a-149a.

STATEMENT

1. a. In the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, Congress sought "to maintain the control of the United States over all the channels of radio transmission" by "provid[ing] for the use of such channels" under licenses that are granted "for limited periods of time," 47 U.S.C. 301, and that are issued and renewed only upon a finding that "the public interest, convenience, and necessity" will thereby be served. 47 U.S.C. 309(a), (k)(1)(A). A broadcast licensee is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981) (quotation marks omitted). Among a licensee's public-interest obligations is the duty not to transmit indecent material during times of the day when children are likely to be in the audience. See *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 4 F.C.C.R. 8358, 8358 ¶ 2 (1989).

The duty of licensees to refrain from the broadcast of indecent material was first set forth in the Radio Act of 1927, ch. 169, § 29, 44 Stat. 1172. It is now codified at 18 U.S.C. 1464, which makes it unlawful to "utter[] any obscene, indecent, or profane language by means of radio communication." As directed by Congress, the Federal Communications Commission (FCC or Commission) has adopted regulations specifying that indecent material may not be broadcast between the hours of 6 a.m. and 10

p.m. 47 C.F.R. 73.3999(b) (adopted pursuant to Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954); see *Action for Children's Television* v. *FCC*, 58 F.3d 654, 669-670 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996) (*ACT III*). The Commission does not regulate indecent broadcasts outside that time period. The FCC has authority to enforce the indecency prohibition by, among other things, imposing civil forfeitures, see 47 U.S.C. 503(b)(1)(B) and (D), or taking violations into account during license-renewal proceedings, see 47 U.S.C. 307 (2000 & Supp. V 2005); 47 U.S.C. 309(k).

b. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court upheld the constitutionality of the FCC's authority to regulate indecent broadcasts. At issue in *Pacifica* was the midday radio broadcast of George Carlin's monologue "Filthy Words." Responding to a listener complaint, the Commission determined that the broadcast violated Section 1464. In reaching that conclusion, it applied a "concept of 'indecent' [that] is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at 731-732 (quoting *In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York*, 56 F.C.C.2d 94, 98 (1975) (*WBAI*)). As the Court observed, "[t]he Commission's decision rested entirely on a nuisance rationale under which context is all-important," and that "requires consideration of a host of variables." *Id.* at 750.

In rejecting a constitutional challenge to the Commission's enforcement of Section 1464, the Court explained

that, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. That is in part because "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" in that "material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Ibid.* In addition, the Court emphasized, "broadcasting is uniquely accessible to children, even those too young to read," and the broadcast of indecent language can "enlarge[] a child's vocabulary in an instant." *Id.* at 749. The Court concluded that "the government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household justified the regulation of otherwise protected expression." *Ibid.* (internal quotation marks and citation omitted); see *id.* at 762 (Powell, J., concurring). The Court rejected the contention that "one may avoid further offense by turning off the radio when he hears indecent language," comparing it to "saying that the remedy for an assault is to run away after the first blow." *Id.* at 748-749.

c. For several years after *Pacifica*, the Commission enforced the indecency prohibition only against "material that closely resembled the George Carlin monologue," that is, material that "involved the repeated use, for shock value, of words similar or identical to those" used by Carlin. *In re Infinity Broad. Corp. of Penn.*, 3 F.C.C.R. 930, 930 ¶ 4 (1987) (*Infinity Reconsideration Order*). In 1987, however, the Commission determined that such a "highly restricted enforcement standard * * * was unduly narrow as a matter of law" because it

"focus[ed] exclusively on specific words rather than the generic definition of indecency." *Id.* at 930 ¶ 5. Accordingly, the Commission concluded that, in enforcing Section 1464, it would apply the generic indecency test articulated in *Pacifica*, that is, whether the language "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience." *Id.* at 930 ¶¶ 2, 5.[1]

In making that change, the Commission recognized that "the question of whether material is patently offensive requires careful consideration of context." *Infinity Reconsideration Order*, 3 F.C.C.R. at 932 ¶ 16. Despite its renewed emphasis on context, however, the Commission stated that "[i]f a complaint focuses solely on the use of expletives * * * deliberate and repetitive use * * * is a requisite to a finding of indecency." *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (1987).

The District of Columbia Circuit upheld the Commission's decision to move beyond its narrow post-*Pacifica* policies. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (1988) (R.B. Ginsburg, J.) (*ACT I*). As the court explained, "[s]hort of the thesis that *only* the seven dirty words are properly designated indecent * * * some more expansive definition must be attempted." *Id.* at 1338. Because "[t]he FCC rationally

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[1] Thus, the Commission found that certain broadcasts of the Howard Stern show would have been actionably indecent under its indecency standards as clarified because they involved "not merely an occasional off-color reference," but an "explicit" discussion of "matters sexual and excretory, in a pandering and titillating fashion," even though they did not employ "the specific words used in the *Pacifica* case." *In re Infinity Broad. Corp. of Penn.*, 2 F.C.C.R. 2705, 2706 ¶¶ 10, 11 (1987).

determined that its former policy could yield anomalous, even arbitrary results," and "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested," the court concluded that the agency had provided an adequate explanation for its policy. *Ibid.*[2]

d. In 2001, the Commission issued a policy statement to provide further guidance concerning the indecency standard. See *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 7999 ¶ 1 (2001) (*Industry Guidance*). In that statement, the Commission explained that it applies a two-part test to determine whether a broadcast is indecent. First, the material at issue "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Id.* at 8002 ¶ 7. Second, "the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8.

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[2] In a later portion of the same decision, the District of Columbia Circuit remanded the Commission's tentative determination that indecent material could be broadcast only after midnight, finding that the Commission had "failed to consider fairly and fully what time lines should be drawn." *ACT I*, 852 F.2d at 1341. Thereafter, the court invalidated a congressional directive to enforce Section 1464 "on a 24 hour per day basis." *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1507 (D.C. Cir. 1991) (*ACT II*) (emphasis omitted), cert. denied, 503 U.S. 913, 914 (1992). It later upheld a 10 p.m. to 6 a.m. statutory safe harbor for indecent broadcasts. See *ACT III*, 58 F.3d at 656; Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16a, 106 Stat. 954. The FCC's current regulations provide that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent." 47 C.F.R. 73.3999(b).

The policy statement reiterated that whether a broadcast is "patently offensive" turns on "the *full context*" in which the material is broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9. The Commission set out three "principal factors" that it considered "significant" in evaluating patent offensiveness: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Id.* at 8003 ¶ 10 (emphases omitted). With respect to the second factor, the policy statement noted that "[r]epetition of and persistent focus on sexual or excretory material" may "exacerbate the potential offensiveness of broadcasts," but that "even relatively fleeting references may be found indecent where other factors"—such as the use of "graphic or explicit" language—"contribute to a finding of patent offensiveness." *Id.* at 8008-8009 ¶¶ 17, 19.

e. In January 2003, the NBC television network broadcast the Golden Globe Awards. In accepting the award for Best Original Song, the rock singer Bono stated: "This is really, really fucking brilliant. Really, really great." *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (2004) (*Golden Globe Awards Order*). The Commission concluded that the broadcast of Bono's remark was indecent even though Bono's use of the F-Word was not "sus-

tained or repeated." *Id.* at 4980 ¶ 12.[3] The Commission explained that, even when used merely as an "intensifier," the F-Word falls within the subject-matter scope of indecency regulation because, given its "core meaning," the word "inherently has a sexual connotation." *Id.* at 4978 ¶ 8. The Commission also found that Bono's remark was "patently offensive" because "[t]he 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language"; its use "invariably invokes a coarse sexual image"; and its broadcast "on a nationally telecast awards ceremony[] was shocking and gratuitous." *Id.* at 4979 ¶ 9. The Commission observed that NBC had not claimed that its broadcast of the word had "any political, scientific or other independent value." *Ibid.*

The Commission recognized that its decision "depart[ed]" from prior cases insofar as they stated that "isolated or fleeting use of the 'F-Word' or a variant thereof in situations such as this is not indecent," and it made clear "that such cases are not good law to that extent." *Golden Globe Awards Order*, 19 F.C.C.R. at 4980 ¶ 12. Instead, the Commission concluded, "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.*

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[3] The FCC's Enforcement Bureau had initially ruled that the broadcast was not indecent because Bono used the F-Word "as an adjective or expletive to emphasize an exclamation," and because the remarks were "fleeting and isolated." See *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19,859, 19,861 ¶¶ 5 6 (2003). The *Golden Globe Awards Order* reversed that staff decision.

Although the Commission concluded that Bono's remark was indecent, it did not impose a sanction. Because "prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent," the Commission determined that NBC "did not have the requisite notice to justify a penalty." *Golden Globe Awards Order*, 19 F.C.C.R. at 4980, 4982 ¶¶ 12, 15.

2. a. This case arises out of two broadcasts that aired before the Commission released the *Golden Globe Awards Order*. On December 9, 2002, the Fox television network broadcast the 2002 Billboard Music Awards beginning at 8 p.m. eastern standard time. During that broadcast, the entertainer Cher received an "Artist Achievement Award." In her acceptance speech, she said:

> I've had unbelievable support in my life and I've worked really hard. I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't.

Pet. App. 115a-116a.

The following year, on December 10, 2003, Fox broadcast the 2003 Billboard Music Awards beginning at 8 p.m. eastern standard time. Nicole Richie and Paris Hilton, the stars of Fox's show "The Simple Life," presented one of the awards. During their presentation, they engaged in the following exchange:

> Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
>
> Nicole Richie: Okay, God.

> Paris Hilton: It feels so good to be standing here tonight.
>
> Nicole Richie: Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.

Pet. App. 69a-71a.

b. The Commission received complaints from viewers about both Billboard Music Awards broadcasts. See, *e.g.*, J.A. 19 ("My son and I were watching the 2003 Billboard Music Awards the other night. * * * [M]y son asked me what f**king meant."); J.A. 20 ("It is hard enough to teach your children manners and decent behavior without showing young adults on the TV using" expletives.). It issued an order addressing those complaints as well as complaints against numerous other programs, including (1) several "NYPD Blue" episodes aired by ABC in which, among other things, a character on the show used the term "bullshit," and (2) an episode of CBS's "The Early Show" in which a contestant on CBS's "Survivor: Vanuatu" referred to another contestant as a "bullshitter" in a live interview. J.A. 86-109. The Commission concluded that each of those four programs contained indecent language. J.A. 86. As in the *Golden Globe Awards Order*, however, the Commission did not impose any sanction because it concluded that broadcast licensees lacked adequate notice of its new policy regarding the airing of expletives. *Ibid.*

c. Respondents petitioned for review, and the cases were consolidated in the United States Court of Appeals for the Second Circuit. Pet. App. 66a. At the Commission's request, the court of appeals granted a remand in order to provide the agency an opportunity to address in

the first instance the broadcasters' specific challenges to the Commission's determinations with regard to their programs. *Id.* at 67a-68a.

d. On remand, the Commission vacated the relevant portions of its earlier order. Pet. App. 68a. It dismissed the complaints against "NYPD Blue" on procedural grounds, *id.* at 129a-131a, and it concluded that the use of an expletive on "The Early Show" was not indecent because it occurred in the context of a "news interview," *id.* at 125a-128a. The Commission explained that, "regardless of whether such language would be actionable in the context of an entertainment program," it was not "actionably indecent * * * in this context." *Id.* at 128a.

At the same time, the Commission reaffirmed its conclusion that the broadcast of the 2002 and 2003 Billboard Music Awards violated the prohibitions against the broadcast of indecent material. Pet. App. 69a-124a. Applying the framework set out in the 2001 *Industry Guidance*, the Commission concluded that the expletives aired during the Billboard Music Awards were sexual or excretory references that fell within the subject-matter scope of the indecency definition. Fox did not dispute that Richie's use of the S-Word referred to excrement. *Id.* at 73a. In addition, the Commission reaffirmed that the F-Word (used by both Richie and Cher) inherently "has a sexual connotation even if the word is not used literally" because "the word's power to 'intensify' and offend derives from its implicit sexual meaning." *Id.* at 73a-74a; see *id.* at 117a-118a. The Commission also concluded that both broadcasts were "patently offensive." *Id.* at 74a, 118a, 120a. With respect to both broadcasts, the Commission found that the language used was not only graphic and shocking—particularly in the context of nationally televised awards programs viewed by a

substantial number of children—but was also gratuitous. *Id.* at 76a-77a (for the 2003 broadcast, 2.3 million viewers (23.4% of the audience) were under age 18, and 1.1 million viewers (11% of the audience) were under age 12); 119a-120a (for the 2002 broadcast, 2.6 million viewers (27.9% of the audience) were under age 18, and 1.2 million viewers (12.7% of the audience) were under age 12). Indeed, the Commission noted, Fox did not argue that the expletives at issue "had any artistic merit or were necessary to convey any message." *Id.* at 76a n.44; see *id.* at 120a n.191.

As in the *Golden Globe Awards Order*, the Commission rejected the argument that the fleeting nature of the utterances should preclude a finding that the language was indecent. Pet. App. 82a-83a. The Commission explained that it was "artificial" to maintain a distinction between "expletives," which had to be repeated to be actionable, and literal "descriptions or depictions of sexual or excretory functions," which did not. *Id.* at 82a; see *Industry Guidance*, 16 F.C.C.R. at 8008, 8009 ¶¶ 17, 19. As the Commission observed, "[i]n evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination." Pet. App. 83a. The Commission accordingly found that "categorically requiring repeated use of expletives in order to find material indecent" would be "inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." *Ibid.* The Commission noted that *Pacifica* did not require it to "ignore 'the first blow' to the television audience in the circumstances presented here." *Ibid.* The Commission also observed that "granting an automatic exemption for 'isolated or fleeting' expletives" would allow broadcasters "to air any one of a

number of offensive sexual or excretory words, regardless of context, with impunity during the middle of the afternoon provided that they did not air more than one expletive in any program segment." *Id.* at 84a-85a. Permitting "[s]uch a result," the Commission explained, "would be inconsistent with our obligation to enforce the law responsibly." *Id.* at 85a.

The Commission again declined to sanction Fox because "it was not clear at the time that broadcasters could be punished for the kind of comment at issue here." Pet. App. 122a; see *id.* at 113a. It therefore found no need to address whether the broadcast-indecency violations were "willful" within the meaning of 47 U.S.C. 503(b), which authorizes the Commission to impose monetary forfeitures for "willful[]" or "repeated[]" violations of the Communications Act or Commission rules. Pet. App. 114a; 124a n.206. And because it imposed no sanction, the Commission stated that it would not consider its indecency findings "to have an adverse impact upon" the Fox stations that participated in the broadcasts, either "as part of the [license] renewal process or in any other context." *Id.* at 113a-114a, 124a.

3. A divided panel of the court of appeals vacated and remanded. Pet. App. 1a-60a.

a. The court of appeals concluded that the Commission's policy regarding isolated expletives was "arbitrary and capricious under the Administrative Procedure Act" because the Commission had "failed to articulate a reasoned basis for [its] change in policy." Pet. App. 2a. Taking the view that the "primary reason for the crackdown on fleeting expletives" was to protect "viewers (including children)" from the "first blow" of an expletive, the court of appeals stated that the Commission had failed to provide a "reasonable explanation for

why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." *Id.* at 25a.

Even "[m]ore problematic," according to the court of appeals, was the fact that "the Commission does not take the position that *any* occurrence of an expletive is indecent." Pet. App. 25a-26a. Because the Commission did not flatly prohibit the broadcast of vulgar expletives in every circumstance, the court concluded that "the record simply does not support the position that the Commission's new policy was based on its concern with the public's mere exposure to this language on the airwaves." *Id.* at 27a-28a. Even though the court recognized that any "per se ban would likely raise constitutional questions above and beyond the concerns raised by the [Commission's] current policy," *id.* at 26a n.7, the court nonetheless believed that it was arbitrary for the Commission to prohibit isolated expletives only in circumstances where their utterance was patently offensive.

The court of appeals also took issue with the Commission's determination that an expletive such as the F-Word has an inescapably sexual connotation, stating that "[t]his defies any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any 'sexual or excretory' meaning." Pet. App. 29a. In addition, the court dismissed as "divorced from reality" the Commission's concern that a "per se exemption for fleeting expletives would 'permit broadcasters to air expletives at all hours of the day so long as they did so one at a time.'" *Id.* at 30a (citation omitted). And it faulted the Commission for failing to produce "any evidence that suggests a fleeting expletive is harmful," much less that

any such harm was "serious enough to warrant government regulation." *Id.* at 32a.

Although the court of appeals "refrain[ed] from deciding the various constitutional challenges * * * raised by the Networks," it made certain "observations" regarding the constitutionality of the Commission's broadcast-indecency policies. Pet. App. 35a. In those comments, which the court described as "dicta," *id.* at 35a n.12, the court "question[ed] whether the FCC's indecency test can survive First Amendment scrutiny," *id.* at 36a. Nevertheless, because the court decided the case on the "narrow ground" that the Commission's explanation for its policy was arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, it vacated and remanded "so that the Commission can set forth [its] analysis." *Id.* at 45a.

b. Judge Leval dissented. Pet. App. 46a-60a. In his view, the Commission had complied with the APA because it provided a "sensible" reason for its "relatively modest change of standard." *Id.* at 49a. In addition, he concluded that "[w]hat we have [here] is at most a difference of opinion between a court and an agency," and that in light of the Commission's explanation and "the deference courts must give to the reasoning of a duly authorized administrative agency in matters within the agency's competence," there was no basis for the court to substitute its judgment for the Commission's in this case. *Id.* at 58a-59a.

Judge Leval observed that "the Commission's central explanation for the change was essentially its perception that the 'F-Word' is not only of extreme and graphic vulgarity, but also conveys an inescapably sexual connotation." Pet. App. 49a. The FCC therefore "concluded that the use" of that expletive, "even in a single fleeting

instance without repetition," was "likely to constitute an offense to the decency standards of § 1464." *Id.* at 50a. "In other words," Judge Leval stated, "the Commission found, contrary to its earlier policy, that the word is of such graphic explicitness in inevitable reference to sexual activity that absence of repetition does not save it from violating the standard of decency." *Id.* at 52a.

Unlike the majority, Judge Leval was not troubled by the Commission's decision not to "follow an all-or-nothing policy." Pet. App. 53a. Instead, he explained that the Commission "attempt[ed] to draw context-based distinctions, with the result that no violation will be found in circumstances where usage is considered sufficiently justified that it does not constitute indecency." *Ibid.* Far from an example of "irrationality," Judge Leval stated, the policy "is an attempt on the part of the Commission over the years to reconcile conflicting values through standards which take account of context." *Id.* at 54a-55a. As Judge Leval explained, the Commission's context-driven approach "is in no way a consequence of the Commission's change of standard for fleeting expletives. It applies across the board to all circumstances." *Id.* at 53a. Thus, the "majority's criticism of inconsistency is not properly directed against the change of standard here in question," which "[i]f anything * * * has made the Commission more consistent rather than less" by ensuring that "the same context-based factors will apply to all circumstances." *Id.* at 54a.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that the Commission's change in policy regarding isolated exple-

tives during times when children are likely to be in the audience violates the APA.

Congress has directed the Federal Communications Commission to enforce the statutory prohibition on the broadcast of "any obscene, indecent, or profane" language over the public airwaves. 18 U.S.C. 1464. In carrying out that duty, the Commission employs a contextual analysis that this Court upheld in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). Indeed, in *Pacifica*, the Court recognized that "context is all-important." *Id.* at 750. Until recently, the Commission made one factor dispositive in its analysis in certain cases by holding that the utterance of a single vulgar expletive could not be found indecent, no matter how strongly other contextual factors weighed in favor of such a finding. As the Commission reaffirmed in the order at issue here, that per se, one-free-expletive rule was inconsistent with a context-based approach to broadcast indecency enforcement. In abandoning that rule, the Commission acknowledged that it was adopting a new indecency enforcement policy, declined to impose fines, and provided a reasoned explanation for the change. That explanation fully satisfied the requirements of the APA and is well within the zone of discretion in which an administrative agency may operate in carrying out its statutory mandate.

The criticisms by the court of appeals of the Commission's change of policy are unfounded. Not only do those criticisms rest on an inappropriate second-guessing of policy judgments committed to the agency by Congress, they also have less to do with the Commission's revised policy on isolated expletives than they do with the enterprise of broadcast-indecency enforcement in general. In

that respect, the analysis of the court of appeals rests on premises rejected by this Court in *Pacifica*.

The court of appeals dismissed the Commission's concern for protecting audiences likely to include children from the broadcast of a single expletive because the Commission does not take the position that the broadcast of vulgar expletives is *always* indecent. But nothing in the APA requires the Commission to operate with the blunt instrument of an "all-or-nothing" policy in this area; under a contextual analysis, different contexts can appropriately lead to different results, even where the same word is concerned. In any number of ways, the use of an expletive by, for example, a wiretapped organized-crime figure on a news program is far removed from the use of the same word in a dialogue on an awards show. There is no statutory reason why the FCC is compelled to treat such fundamentally different cases the same way.

The court of appeals also erred in dismissing the Commission's determination that the F-Word has a sexual connotation even when used in a non-literal sense as an intensifier or as part of an insult. The Commission, after having studied the issue, is in a better position to evaluate the connotations of language. As the Commission explained, the F-Word is effective when used to intensify or insult precisely because it has an offensive sexual connotation. Moreover, fine points of the distinctions between denotations and connotations may be lost on children seeking an explanation of the word's meaning from their parents. The logic of the court's contrary rationale would suggest that the F-Word and other vulgar expletives should escape indecency regulation, even if repeated, unless it could be proved that the intent of

the speaker was to use the words in accordance with their literal meanings.

The court of appeals had no basis for demanding that the Commission demonstrate that broadcasters would flood the airwaves with expletives in the absence of a change in policy. It was sufficient for the Commission to point out that the logic of its prior policy, which would permit the airing of unlimited expletives one at a time, was inconsistent with responsible enforcement of the statute. In any event, making a predictive judgment on a matter within an agency's realm of expertise is the responsibility of the agency, not the courts. Nor was the Commission required to amass evidence that the broadcast of isolated expletives would be harmful to children. The Commission's duty is to enforce the statute that Congress enacted, not to second-guess the evidentiary basis for its enactment. In any event, courts have long recognized that exposure to indecent material risks harm to a child's psychological and moral development to an extent that makes it the proper subject of regulation. The court of appeals had no basis to override the Commission's judgment on the risks that isolated expletives pose to children during the broadcast times at issue.

Finally, because the adequacy of the Commission's explanation for its revised policy was the only issue addressed by the court of appeals, the Court should remand the case to allow that court to consider, in the first instance, respondents' other challenges to the Commission's order. Although the court of appeals made various "observations" about the constitutional challenges raised by respondents, it explicitly "refrain[ed] from deciding [those] constitutional challenges." Pet. App. 35a. And there is no reason for this Court to depart

from its customary practice and reach out to decide constitutional questions not passed on below.

ARGUMENT

THE COURT OF APPEALS ERRED IN INVALIDATING THE COMMISSION'S POLICY UNDER THE APA

A. The FCC Satisfied The Requirements Of The APA Because It Gave A Reasonable Explanation For Its Changed Enforcement Policy

As this case comes to this Court it turns on the application of well-settled principles of administrative law. Under the APA's arbitrary-and-capricious standard, "[t]he scope of review * * * is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see 5 U.S.C. 706(2)(A). That is no less true when the policy under review reflects a change in position. The APA does not lock an agency into a single view for all time. Instead, under the APA, a court must uphold an agency's revised policy so long as the agency has given a reasoned explanation for the change.

This case concerns the Commission's policy on the broadcast of certain expletives during the time when children are most likely to be in the audience. The FCC expressly acknowledged that the enforcement policy first announced in the *Golden Globe Awards Order* represented a reversal of its prior policy, which had effectively imposed a per se rule under which isolated expletives could not be deemed indecent. The Commission accordingly refrained from imposing fines for the violations. The Commission gave several reasons for the change, including that the revised policy harmonized the treatment of expletives with the Commission's general

approach to indecency enforcement, under which context is "all-important," *Pacifica*, 438 U.S. at 750, and no one factor is dispositive. The agency's explanation fully satisfied the requirements of the APA, and the court of appeals erred in setting aside the Commission's order.

1. The APA permits an agency to change its policy as long as it provides a reasonable explanation for doing so

The APA does not require "[r]egulatory agencies [to] establish rules of conduct to last forever." *State Farm*, 463 U.S. at 42 (quoting *American Trucking Ass'ns* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967)). To the contrary, this Court has recognized that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances." *Id.* at 57 (quoting *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)). Indeed, far from being locked into one position by the APA, an agency has an obligation to reconsider "the wisdom of its policy on a continuing basis." *NCTA* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 863-864 (1984)).

When an agency changes its policy, the APA requires only that it "supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 42. That analysis may show that the change is required by changed circumstances. But an agency also may alter its policy for the simple reason that, in its judgment, the "prior policy failed to implement properly the statute." *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991); see *Brand X*, 545 U.S. at 981 (explaining that an agency may make a policy change "in response to changed factual circumstances, or a change

in administrations") (citation omitted). The "discretion provided by the ambiguities of a statute" is left "with the implementing agency," not the reviewing court. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996).

2. The Commission acknowledged its change in policy

As the court of appeals recognized, Pet. App. 20a-21a, the Commission expressly acknowledged that its abandonment of a per se rule requiring that expletives be repeated in order to be indecent represented a change in policy. In the *Golden Globe Awards Order*, the Commission noted that "prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' * * * are not indecent or would not be acted upon," and it explained "that any such interpretation is no longer good law." 19 F.C.C.R. at 4980 ¶ 12. The Commission further stated: "We now depart from * * * cases holding that isolated or fleeting use of the 'F-Word' or a variant thereof in situations such as this is not indecent." *Ibid.* Instead, the Commission explained, "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.*

In the order at issue here, the Commission elaborated on its statements in the *Golden Globe Awards Order*. It explained that the decisions that had established a per se rule "that expletives had to be repeated to be indecent" were "seriously flawed" and were "appropriately disavowed." Pet. App. 82a-83a.

Respondents suggest that the Commission said in its order "that its indecency policy had not changed and that no reasoned basis for that change was required." Fox Br. in Opp. 15; see NBC Br. in Opp. 17. That claim

ignores the relevant portions of the Commission's orders, and it overlooks that the Commission acknowledged its change in policy not only in its words but also in its actions. The Commission did not sanction Fox for either broadcast at issue here, and, in the case of the 2002 Billboard Music Awards, the only reason for its forbearance was its recognition that "it was not clear at the time that broadcasters could be punished for the kind of comment at issue here." Pet. App. 122a; see *id.* at 124a & n.206. In sum, the Commission's orders reflect a candid recognition that the *Golden Globe Awards Order* represented a change in policy—one that the Commission determined would better serve its statutory obligation to protect children from exposure to indecent broadcasts during the times of the day they are most likely to be in the audience.

3. The Commission provided a reasonable explanation for the change in policy

Before the *Golden Globe Awards Order*, the Commission's indecency policy was largely to ignore context when an expletive was not repeated. In the *Golden Globe Awards Order* and in the order at issue here, the Commission concluded that such a categorical exception or safe harbor was not warranted. The Commission offered three reasons for that conclusion, and its explanation fully satisfies the deferential standard of the APA.

a. The "most important[]" reason for its change in policy, the Commission explained, was that "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." Pet. App. 83a. The effect of the Commission's pre-*Golden Globe Awards Order* pol-

icy was to treat one contextual factor—"whether material had been repeated"—as "decisive" regardless of whether other factors (such as the explicitness or shocking nature of the material) contributed to the patent offensiveness of the broadcast. *Id.* at 83a. That result was "at odds" not only "with the Commission's overall enforcement policy," *ibid.*, but also with the contextual inquiry mandated by this Court's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978).

In *Pacifica*, this Court upheld the Commission's authority to regulate broadcast indecency under "a nuisance rationale under which context is all-important." 438 U.S. at 750; see *id.* at 742 (plurality opinion) (noting that "indecency is largely a function of context—it cannot be adequately judged in the abstract"). As the Court explained, because a "nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard," the application of the indecency standard to a particular broadcast "requires consideration of a host of variables," including the "time of day," "the language * * * used," and "the composition of the audience." *Id.* at 750 (quoting *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926)). Consistent with *Pacifica*, the Commission has implemented a policy for enforcing federal indecency restrictions that looks to "the *full context* in which the material appear[s]." *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 9. For example, "[e]xplicit language in the context of a *bona fide* newscast might not be patently offensive, while [in another context] sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be." *Id.* at 8002-8003 ¶ 9 (footnote omitted).

As Judge Leval observed, the Commission's revised policy "has made the Commission more consistent rath-

er than less, because under the new rule, the same context-based factors will apply to all circumstances." Pet. App. 54a. The revised policy is also more faithful to the text of the governing statute, which prohibits the broadcast of "*any* * * * indecent * * * language." 18 U.S.C. 1464 (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). The word "any" does not lend itself to a safe-harbor policy in which some indecency is permitted if it is not repeated. Under the Commission's revised policy, the statute can be applied to the broadcast of any indecent language, regardless of whether particular words are repeated.

b. The Commission also explained its change in policy by noting this Court's rejection in *Pacifica* of the argument that one could fully protect oneself—or, more to the point, one's children—from indecent programming "by turning off the broadcast upon hearing indecent language." Pet. App. 84a. "To say that one may avoid further offense by turning off the radio when he hears indecent language," the Court stated, "is like saying that the remedy for an assault is to run away after the first blow." *Pacifica*, 438 U.S. at 748-749. The Commission likewise concluded that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow'" of vulgar expletives in circumstances in which their use is patently offensive. Pet. App. 84a. Particularly given that some of the complaints that the Commission received with respect to the broadcasts at issue in this case concerned the impact of isolated expletives on children, it was appropriate for the Commission to take

into account the full impact that a "first blow" may have in this context. See, *e.g.*, J.A. 15 ("My son asked me Mommy what is f[]ing?"); J.A. 19 ("My son and I were watching the 2003 Billboard Music Awards the other night. * * * [M]y son asked me what f**king meant."); J.A. 20 ("It is hard enough to teach your children manners and decent behavior without showing young adults on the TV using" expletives.).

c. Finally, the Commission observed that a blanket exemption for isolated expletives "would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time." Pet. App. 84a-85a. "For example," the Commission noted, "broadcasters would be able to air any one of a number of offensive sexual or excretory words, regardless of context, with impunity during the middle of the afternoon provided that they did not air more than one expletive in any program segment." *Id.* at 85a. "Such a result," the Commission rightly concluded, "would be inconsistent with our obligation to enforce the law responsibly." *Ibid.*[4]

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[4] The Commission's revised policy is further supported by the 2006 enactment of the Broadcast Decency Enforcement Act of 2005 (BDEA), Pub. L. No. 109-235, 120 Stat. 491. The BDEA substantially increased the maximum forfeitures that may be levied against licensees that broadcast "obscene, indecent, or profane language." § 2, 120 Stat. 491 (to be codified at 47 U.S.C. 503(b)(2)(C)(ii)). The BDEA was enacted after the Commission released the *Golden Globe Awards Order*, yet Congress expressed no disagreement with the FCC's revised policy. To the contrary, the House Report cited Bono's remark during the Golden Globe Awards and Nicole Richie's remarks during the 2003 Billboard Awards as evidence of the need for more rigorous enforcement of the broadcast-indecency prohibition. H.R. Rep. No. 5, 109th Cong., 1st Sess. 2 (2005). That Congress had these broadcasts in mind when it decided to increase the FCC's forfeiture authority provides

B. The Court Of Appeals Erred In Substituting Its Judgment For That Of The FCC

The court of appeals gave three reasons for rejecting the Commission's explanation of its change in policy. First, the court concluded that the Commission's objective of restricting the broadcast of nonrepeated vulgar expletives was inconsistent with its actual policy, which takes account of context in determining whether the use of those expletives is patently offensive. Pet. App. 25a-28a. Second, the court disputed the Commission's conclusion that a broadcast containing the F-Word could be indecent even when the word is not used literally to describe sexual activity. *Id.* at 29a-30a. And third, the court disputed the factual underpinnings for the agency's policy. *Id.* at 30a, 32a-33a.

None of those reasons withstands scrutiny. Instead, all three rest on a failure to appreciate the limited scope of review under the APA in reviewing agency policy determinations such as this. In addition, they have little to do with the Commission's change of policy on isolated expletives, but instead appear to reflect hostility to the agency's longstanding treatment of indecency in general. In that respect, the reasoning of the court of appeals is incompatible with this Court's decision in *Pacifica*. The court of appeals may consider respondents' constitutional challenges to the Commission's order once it has cleared respondents' statutory objections, but the Commission's efforts to give effect to the reasoning of

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additional evidence that the Commission's revised policy falls within its authority under Section 1464. Cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

Pacifica provide no basis for second-guessing its determination under the APA.

1. The Commission's consideration of context in determining offensiveness does not undermine its conclusion that an isolated expletive may be indecent

In its analysis of the FCC's change in policy, the court of appeals concentrated on the Commission's statement that granting an automatic exemption for a single utterance of an expletive "unfairly forces viewers (including children) to take 'the first blow.'" Pet. App. 84a. According to the court, "the 'first blow' theory" —which this Court itself credited in *Pacifica*, 438 U.S. at 748-749—"bears no rational connection to the Commission's actual policy regarding fleeting expletives" because "the Commission does not take the position that *any* occurrence of an expletive" is indecent. Pet. App. 26a.

Because it focused on the "first blow" concept, the court of appeals did not address the principal rationale behind the Commission's change in policy: the desire to make the implementation of the contextual approach to indecency determinations more consistent by no longer making one factor dispositive in a particular category of cases. The Commission's policy simply takes into account that some blows are likely to be more harmful to the audience (including children) than others, and even more to the point, that in some contexts a first blow can be sufficient. The "first blow" metaphor recognizes that in certain contexts even a single word can be so offensive that it should be subject to regulation; that is why a one-free-expletive rule is incompatible with the proper application of a contextual analysis. As the Commission explained—but the court of appeals ignored—the "most

important[]" reason for the Commission's decision here was the "inconsisten[cy]" between the contextual approach and a categorical rule requiring repetition of expletives. Pet. App. 83a.

The Commission's failure to "take the position that *any* occurrence of an expletive is indecent," Pet. App. 26a, is a necessary consequence of a meaningful contextual analysis. Judge Leval was therefore correct when he observed that the court's criticism "is not properly directed against the change of standard" but instead against the entire contextual approach to indecency enforcement. *Id.* at 54a. For example, the court looked to the Commission's finding that the use of expletives in a broadcast of the film "Saving Private Ryan" did not make the broadcast indecent, and it inferred that the Commission must not be "concern[ed] with the public's mere exposure to this language on the airwaves." *Id.* at 27a-28a. But the expletives in "Saving Private Ryan" arose in a much different context and in any event were repeated. Accordingly, if the non-indecency finding with respect to the repeated expletives in "Saving Private Ryan" makes the Commission's indecency finding with respect to the Billboard Music Awards broadcasts irrational, it would equally preclude an indecency finding with respect to any broadcast of repeated expletives, such as the Carlin monologue.

Contrary to the reasoning of the court of apeals, the FCC's contextual approach is appropriate because the context in which a word is used is relevant in determining whether the word is offensive. Judge Leval illustrated the point well when he observed that the judges of the court of appeals had used the F-Word at oral argument: "Had the case been on another subject, such usage would surely have seemed inappropriate. Because

of the issues in this case, the word was central to the issues being discussed. It is not irrational to take context into account to determine whether use of the word is indecent." Pet. App. 54a n.16. In other words, "contemporary community standards" recognize that a word that is appropriate in some contexts—such as an oral argument in an indecency case—may be "patently offensive" in others—such as a prime-time awards show when children are in the viewing audience. *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 8. Nothing in the APA prevents the Commission from reaching—or enforcing—that common-sense conclusion.

Additionally, when offensive language is used in certain contexts—such as a news program—countervailing First Amendment interests may be at stake, making it appropriate for the Commission to "proceed with the utmost restraint." Pet. App. 127a. The court of appeals was therefore wrong to criticize the FCC for its decision to "excuse an expletive" that occurred during a "news interview." *Id.* at 26a (quoting *id.* at 128a). Agencies are not required to pursue their policies at all costs and in disregard of competing interests, nor are they prohibited from recognizing that those interests may be greater in some contexts than in others. *Id.* at 54a-55a (Leval, J., dissenting) (FCC has properly "reconcile[d] conflicting values through standards which take account of context."); see *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 809-811 (1978); cf. *Chevron*, 467 U.S. at 865-866. In the news context, there is a countervailing interest in respecting "the editorial judgments of broadcast licensees" in presenting news programming, and the Commission properly took that interest into account. Pet. App. 126a-127a (quoting *In re Branton*, 6 F.C.C.R. 610, 610 (1991)).

This Court endorsed the Commission's contextual approach in *Pacifica*. In that case, the Court upheld the Commission's authority to regulate broadcast indecency precisely because "[t]he Commission's decision rested entirely on a nuisance rationale under which context is all-important." 438 U.S. at 750; see *ibid.* (indecency determination "requires consideration of a host of variables"). As Justice Stevens explained, "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context." *Id.* at 747 (plurality opinion). Instead, "[i]t is a characteristic of speech such as this that both its capacity to offend, and its 'social value' * * * vary with the circumstances"; thus, "[w]ords that are commonplace in one setting are shocking in another." *Ibid.* "Because content of that character is not entitled to absolute constitutional protection under all circumstances," Justice Stevens wrote, "we must consider its context in order to determine whether the Commission's action was constitutionally permissible." *Id.* at 747-748; see *id.* at 742 ("indecency is largely a function of context" and "cannot be adequately judged in the abstract"); *id.* at 761 (Powell, J., concurring) (agreeing that "*on the facts of this case*, the Commission's order did not violate respondent's First Amendment rights") (emphasis added). In short, the FCC's contextual analysis was crucial to this Court's endorsement of the Commission's determination in *Pacifica*.[5]

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[5] NBC errs when it asserts (Br. in Opp. 25) that the *Pacifica* Court did not consider whether context was relevant to indecency determinations, because the case involved only "*concededly indecent* speech." In fact, one of the questions before the Court was whether the broadcast of Carlin's monologue was indecent. See *Pacifica*, 438 U.S. at 738-739

According to the court of appeals, a contextual approach to fleeting expletives bears "no rational connection" to the goal of protecting broadcast audiences from the "first blow." Pet. App. 26a. But the Commission's goal was not protecting audiences from a first blow simpliciter, but rather to protect them from indecency, which in some contexts could involve a single blow. Moreover, there is no inherent tension between a "first blow" theory and a consideration of context and, in effect, the potential impact of that blow. Indeed, it was this Court in *Pacifica* that first analogized the broadcast of indecent language to the "first blow" of an assault, 438 U.S. at 748-749, even as it recognized that the same language in a different context—*e.g.*, "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy," *id.* at 750—might not be legally indecent. Moreover, in the discussion of Paul Cohen's famous jacket, *id.* at 747 n.25, 749, Justice Stevens made clear that context could matter in evaluating a single use of an expletive. See *id.* at 750 n.29.

The supposed inconsistency identified by the court of appeals in this case was a necessary consequence of the Commission's application of the analysis embraced by this Court in *Pacifica*. The court of appeals may entertain respondents' constitutional challenges to the Commission's order once the court has properly resolved the statutory challenges to that order. But the Commis-

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("The only other statutory question presented by this case is whether the afternoon broadcast of the 'Filthy Words' monologue was indecent within the meaning of § 1464."); *id.* at 739 (noting "Pacifica's claim that the broadcast was not indecent within the meaning of the statute"); *id.* at 741 (finding "no basis for disagreeing with the Commission's conclusion that indecent language was used in [the] broadcast" of Carlin's monologue).

sion's effort to give effect to the rationale of *Pacifica* provides no basis for invalidating its determination under the APA. Indeed, if anything, an agency's efforts to give effect to this Court's decisions should call for more, not less, deference to its judgments.

2. The Commission reasonably concluded that vulgar expletives need not be used in a literal sense to be indecent

The court of appeals also disagreed with the Commission's judgment that vulgar expletives can be indecent even when they are not used literally. According to the court, the "FCC's change in policy cannot be based on a categorical view that 'any use of [the F-Word] or a variation, in any context, inherently has a sexual connotation,' because * * * the Commission permits even numerous and deliberate uses of that word in certain contexts." Pet. App. 28a n.9 (quoting *Golden Globe Awards Order*, 19 F.C.C.R. at 4978 ¶ 8) (citation omitted). That statement reflects a misunderstanding of the Commission's reasoning. The Commission's determination that the F-Word "has a sexual connotation even if the word is not used literally," *id.* at 74a, 118a, means only that the word falls within the subject-matter scope of the Commission's indecency definition—in other words, that it satisfies the first part of the two-part indecency test. It does not represent a determination that the broadcast of that word is *always* patently offensive, satisfying the second part of the test. There is thus no inconsistency between the Commission's determination that the F-Word has an inescapably sexual connotation and its decisions that have found some broadcasts of the word not indecent.

The court of appeals also believed that the Commission's conclusion that the F-Word always has a sexual connotation was "unsupported by any record evidence and contradicted by the evidence submitted by the Networks." Pet. App. 30a n.10. The court pointed to examples that, in its view, showed that the F-Word can be employed "in everyday conversation without any 'sexual or excretory' meaning," *id.* at 29a, including Bono's statement at the Golden Globe Awards and Vice President Cheney's use of the F-Word in a conversation with Senator Patrick Leahy, *id.* at 29a-30a. That observation is of limited relevance to this case, since it is undisputed that at least one of the expletives at issue was used in a literal sense. *Id.* at 71a.

More fundamentally, the court's criticism was misdirected, because the Commission was well aware that the F-Word may be used "for emphasis or as an intensifier," Pet. App. 73a, or "as a metaphor to express hostility," *id.* at 120a, and that when it is employed in such contexts it "is not used literally," *id.* at 74a. The Commission did not conclude that every use of the F-Word is a literal sexual reference. Rather, it determined that "the word's power to insult and offend derives from its sexual meaning," *id.* at 118a, and that any use of the F-Word therefore "has a sexual *connotation*," *ibid.* (emphasis added); see *id.* at 74a n.39 (citing *American Heritage College Dictionary* 559 (4th ed. 2002)); *id.* at 74a n.40 (citing Robert F. Bloomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell)*, 40 Santa Clara L. Rev. 65, 98 (1999) ("all F-word usage has at least an implicit sexual meaning")). The court of appeals erred in overriding that determination.

As Judge Leval observed, "the Commission did not mean that every speaker who utters [the F-Word] in-

variably intends to communicate an offensive sexual meaning," but that "even when the speaker does not intend a sexual meaning, a substantial part of the community, and of the television audience, will understand the word as freighted with an offensive sexual connotation." Pet. App. 58a. Of course, the force of that "offensive sexual connotation" is precisely why the word is effective when used as an intensifier or an insult. See Steven Pinker, *The Stuff of Thought: Language As a Window Into Human Nature* 369 (2007) ("If you're an English speaker, you can't hear [words such as the F-Word] without calling to mind what they mean to an implicit community of speakers, including the emotions that cling to them."); Timothy Jay, *Why We Curse: A Neuro-Psycho-Social Theory of Speech* 136 (2000) ("Curse words are different" from ordinary words "in that the connotative meaning dominates over the denotative meaning."). And whatever subtle non-literal meanings the F-Word might have to an adult, a child impressed by the use of a new word and asking for an explanation of the word's meaning may be less impressed with subtle distinctions between denotations and connotations or between literal and figurative uses.

Both the FCC and this Court have long recognized the inherent sexual meaning of the F-Word. For example, the expletives in the Carlin monologue were mostly used in a non-literal sense—indeed, one of Carlin's principal themes was that the F-Word "leads a double life," literal and non-literal, a theme he illustrated with numerous examples of phrases employing the F-Word (and other expletives) non-literally. *Pacifica*, 438 U.S. at 754. Nevertheless, in determining that the broadcast of the monologue was indecent, the Commission made no effort to parse the transcript to identify specific lit-

eral uses of expletives or to give the non-literal uses a free pass. Instead, it concluded that, as a general matter, the F-Word and the S-Word "depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards." *WBAI*, 56 F.C.C.2d at 99 ¶ 14. This Court treated the broadcast the same way. See *Pacifica*, 438 U.S. at 739 (noting that "[t]he Commission identified several words that referred to excretory or sexual activities or organs," but without distinguishing between the literal and non-literal uses of those words); *id.* at 745 (plurality opinion) (describing Carlin's monologue as "a broadcast of patently offensive words dealing with sex and excretion").

That is not to say that an expletive's literal or non-literal use is not part of the relevant context in determining whether the use of an expletive is patently offensive. Once again, the court of appeals appears to have taken one strand of the Commission's reasoning and treated it as if it were somehow an end in itself, when in reality the Commission's goal is a context-specific inquiry that does not exclude potentially patently offensive remarks based on a per se rule. Moreover, like its criticisms of the FCC's consideration of context, the court of appeals' statements about non-literal uses of expletives have little to do with the Commission's change of policy with regard to isolated expletives. Instead, under the court's reasoning, the Commission would lack authority to regulate any non-literal uses of offensive sexual or excretory terms, no matter how many times they are deliberately repeated and no matter what time of day the broadcast takes place. That counter-intuitive result is inconsistent with *Pacifica* and the Commission's statutory responsibilities to regulate

indecency, and nothing in the APA requires the Commission to adopt it.

3. The court of appeals erred in second-guessing the Commission's judgment that a change in its indecency enforcement policy was appropriate

Finally, the court of appeals concluded that the Commission's revised policy was unnecessary. Seizing upon the Commission's observation that a blanket exemption for isolated expletives "would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time," Pet. App. 84a-85a, the court opined that because "broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes*," *id.* at 30a, the suggestion that they might do so was "both unsupported by any evidence and directly contradicted by prior experience," *id.* at 30a n.11. The court also objected that the record "is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation." *Id.* at 32a. Neither rationale represents a proper basis for setting aside the agency's predictive judgment on such matters.

a. Retaining an automatic exception to the indecency prohibition for nonrepeated expletives would, at least as a logical matter, undeniably allow broadcasters to air "one expletive in any program segment." Pet. App. 85a. Regardless of whether, or to what extent, the regulated community might exercise self-restraint and not avail itself of a one-free-expletive rule, it was appropriate for the Commission to consider where the logic of the broadcasters' argument would extend, and to conclude that the result "would be inconsistent with [its] obligation to enforce the law responsibly." *Ibid.* Section 1464

broadly prohibits the broadcast of "any" indecent language, and the Commission could reasonably conclude that its prior policy of requiring repetition where expletives were involved "failed to implement properly the statute." *Rust*, 500 U.S. at 187.

Moreover, it was well within the Commission's discretion to make a predictive judgment about the consequences of such a rule on a going-forward basis. There was ample evidence to support the proposition that the broadcast of vulgar expletives would increase in the absence of a change in policy. In the *Golden Globe Awards Order*, the Commission cited a study that found that "offensive" language had increased significantly on broadcast television between 1990 and 2001. 19 F.C.C.R. at 4979 ¶ 9 n.26; see Barbara K. Kaye and Barry S. Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, 7 J. Mass Commc'n & Soc'y 429, 441 (2004) (finding that "offensive" language was used 98 times on major broadcast networks between 8 and 9 p.m. in 1990, but 216 times on the same networks during the same hour in 2001). And the House Committee considering the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491, noted another study that showed that offensive "language increased overall during every timeslot between 1998 and 2002" and that "[f]oul language during the 'family hour' increased by 94.8 percent between 1998 and 2002 and by 109.1 percent during the 9 p.m. time slot." H.R. Rep. No. 5, 109th Cong., 1st Sess. 2 (2005). The Commission could reasonably anticipate that the

trend would continue in the absence of any regulatory change. See Pet. App. 56a-57a (Leval, J., dissenting).[6]

As this Court has explained, when an agency makes judgments of a "predictive nature," "complete factual support in the record for the Commission's judgment or prediction is not possible or required"; instead, "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *National Citizens Comm.*, 436 U.S. at 813-814 (quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); see *Public Citizen, Inc.* v. *NHTSA*, 374 F.3d 1251, 1260-1261 (D.C. Cir. 2004) ("Predictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies.") (quoting *Public Utils. Comm'n of the State of Cal.* v. *FERC*, 24 F.3d 275, 281 (D.C. Cir. 1994)). The court of appeals erred in overriding the agency's predictive judgment here.

b. The court of appeals also refused to uphold the Commission's change in policy because the Commission had failed to produce "any evidence that suggests a

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[6] The Commission had experienced a similar phenomenon before 1987, when its enforcement policy was that "no action was taken unless [the broadcast] involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin 'Filthy Words' monologue." *Infinity Reconsideration Order*, 3 F.C.C.R. at 930 ¶ 4. As a result of that policy, broadcasters believed that "only concentrated and repeated use of the specific offensive words at issue in the *Pacifica* case" would be indecent, and they aired patently offensive programming that simply avoided the use of those words. See, *e.g.*, *In re Infinity Broad. Corp. of Penn.*, 2 F.C.C.R. 2705, 2705 ¶ 7 (1987). The Commission ultimately disavowed the policy as "unduly narrow as a matter of law and inconsistent with [its] enforcement responsibilities under Section 1464." *Infinity Reconsideration Order*, 3 F.C.C.R. at 930 ¶ 5.

fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation." Pet. App. 32a. But 18 U.S.C. 1464, which prohibits the broadcast of "any obscene, indecent, or profane language," does not require the Commission to compile evidence showing that the language to which it applies is otherwise harmful; harm has already been presumed by Congress. The Commission's duty is to enforce the statute enacted by Congress, not to conduct its own investigation of whether the statute is necessary or advisable as a policy matter. When Congress's intent is clear, that is the end of the matter.

That the Commission previously followed a different policy does not suggest that the agency had determined that the broadcast of a single expletive was harmless; instead, the pre-*Golden Globe Awards Order* decisions embodied a policy that a single expletive did not warrant the exercise of the Commission's enforcement authority. See *Industry Guidance*, 16 F.C.C.R. at 8008-8009 ¶ 18. The decision below resulted from the Commission's decision to recalibrate that policy to more "responsibly" enforce federal prohibitions against indecent broadcasting. Pet. App. 85a. The Commission's earlier exercise of its discretion to forbear from enforcing Section 1464 in single-expletive cases does not disable it from enforcing the statute now. Reevaluating the threat posed by certain regulated conduct is precisely the sort of thing that responsible agencies do in carrying out their statutory mandate, and nothing in the APA stands in the way of such diligence.

More importantly, this Court has never insisted that an agency must amass evidence of harm to minors before it may enforce regulations designed to protect their well-being. In *Pacifica*, for example, the Court upheld

the Commission's indecency determination even though there was no evidence of any harm caused by the Carlin monologue. Instead, the Court found a sufficient basis for regulation in the commonsense observations that "broadcasting is uniquely accessible to children, even those too young to read," and that written messages "incomprehensible to a first grader," when broadcast, can "enlarge[] a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 749; see J.A. 15 (viewer complaint regarding the 2003 Billboard Music Awards) ("Mommy what is f[]ing?"). The Commission was not required to conduct further proceedings to arrive at the inescapable conclusion that such language presents a threat to children in the audience.

Likewise, in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a statute prohibiting the sale of material obscene as to minors, even while it recognized that the link between exposure to obscenity and the "ethical and moral development of our youth" was not "an accepted scientific fact." *Id.* at 641. As the District of Columbia Circuit has observed, "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material." *ACT III*, 58 F.3d at 662. To the contrary, "the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech." *Id.* at 661-662. Under this Court's precedents, the court of appeals had no basis for demanding that the Commission identify further "evidence" of harm caused by the expletives at issue.

C. This Court Should Remand To Allow The Court Of Appeals To Consider Respondents' Other Challenges To The FCC's Order

Before the court of appeals, respondents presented several additional challenges to the FCC's order, arguing among other things that Section 1464's indecency prohibition violates the First Amendment. Pet. App. 18a. Because the court of appeals did not rule on those challenges, this Court should remand to allow the court of appeals to consider them in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to reach issues that "were not addressed by the Court of Appeals," because "we are a court of review, not of first view"); see also Fox Br. in Opp. 19 ("[I]f this Court were to * * * reverse the Second Circuit's administrative law holding, the Court would still have to remand the case to the Second Circuit to permit it to consider Fox's scienter and constitutional arguments.").

To be sure, the panel majority made a variety of "observations" about the constitutional issues raised by respondents. Pet. App. 35a. It specifically "refrain[ed] from deciding" those issues, however, and its comments were concededly "dicta." *Ibid.*; *id.* at 35a n.12. It is well settled that this Court reviews "judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). "That admonition has special force when the statements raise constitutional questions," because it is the Court's "settled practice to avoid the unnecessary decision of such issues." *Pacifica*, 438 U.S. at 734; see *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Consideration of respondents' constitutional arguments at this stage would be especially inappropriate in light of the rule that a "cross-petition is required * * * when the respondent seeks to alter the judgment below." *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). In this case, the judgment below vacated the Commission's order and remanded to the Commission "for further proceedings in accordance with" the court's opinion, Pet. App. 144a—that is, for further proceedings aimed at "provid[ing] a reasoned analysis" for the Commission's policy, *id.* at 34a. But if respondents were to prevail on their constitutional challenges, they would be entitled to a different judgment that would provide them with broader relief. Having elected not to file a cross-petition, respondents are precluded from raising their constitutional challenges in this Court. See *Board of Trs. of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 485 (1989).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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RESPONDENT'S BRIEF

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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. § 1464; see 47 C.F.R. § 73.3999, when the expletives are not repeated.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Fox Television Stations, Inc. states that it is a wholly-owned subsidiary of News Corporation, a publicly-traded company. No entity holds 10 percent or more of News Corporation's stock.

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INTRODUCTION

For almost 30 years following this Court's "emphatically narrow" ruling in *Pacifica*, see *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 127 (1989), the FCC "strictly . . . observe[d] the narrowness of the *Pacifica* holding," *WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254, ¶ 10 (1978), and it punished only isolated and fleeting utterances in those rare cases that were egregious and shocking. In 2004, however, the FCC abruptly abandoned the restraint that previous Commissions accepted as constitutionally required, embarking on a regime of draconian enforcement and multimillion dollar fines against the broadcast of even isolated and fleeting expletives. The new regime unsettled broadcasters' expectations, chilled spontaneous programming and threatened the viability of live television.

The Second Circuit correctly concluded that the FCC had not provided an adequate explanation under the Administrative Procedure Act ("APA") for this change in policy and remanded the matter to the agency. The court of appeals also noted that there were serious First Amendment objections to the FCC's expanded regime, and it expressed its opinion that the FCC very likely will have difficulty on remand articulating a standard that both departs from *Pacifica* and still remains consistent with the First Amendment.

Rather than asking for rehearing en banc or opting to provide a better explanation for the FCC's change in policy, petitioners came directly to this Court asking for review of the Second Circuit's decision. In the petition for certiorari, they argued that this case was important enough to warrant this Court's attention because the court of appeals already had

suggested that the FCC could not "adequately respond to the constitutional . . . challenges" raised below. Pet. Cert. Reply 3 (quoting Pet. App. 45a). Now that this Court has granted certiorari, however, petitioners insist that this Court should treat this case as a pure administrative law case and, in essence, act as if there are no constitutional issues implicated by the FCC's new policy. Petitioners' approach would place the Court in the curious position of issuing a decision that neither disposes of this case nor provides any meaningful guidance in any future case. If the policy is ultimately declared unconstitutional, an opinion from this Court finding that the FCC could have adopted the policy under the APA would be academic. Nor would the opinion have any continuing significance in administrative law: petitioners concede that "[a]s this case comes to this Court it turns on the application of well-settled principles of administrative law." Pet. Br. 20.

Having invoked this Court's jurisdiction, however, petitioners cannot evade the fundamental administrative deficiencies in the FCC's new indecency regime and the constitutional problems that pervade it. Even if this is viewed as an "administrative law" case, the constitutional questions remain critically important to a proper consideration of the issues. The FCC's new policy is not only unexplained but unconstitutional, and the Second Circuit should be affirmed.

STATEMENT OF THE CASE

1. The FCC's indecency regime enforces 18 U.S.C. § 1464, which provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall

> be fined under this title or imprisoned not more than two years, or both.

Pet. App. 145a.[1]

The FCC's approach to its regulation of speech under the "indecency" standard for decades was characterized by a cautious and limited enforcement policy that paid serious respect to the First Amendment interests of broadcasters. For several decades, the FCC enforced § 1464 only in the context of license renewal applications. See 47 U.S.C. § 312. The FCC made clear that it could take action only in the most extreme cases, involving extensive violations repeated over a long period of time.[2]

When the FCC first began to exercise its forfeiture power to enforce § 1464 in the mid-1970's, the agency continued to observe a restrained enforcement policy. In 1975, the FCC considered a complaint concerning a broadcast of comedian George Carlin's "Filthy Words" monologue. *Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94 (1975) ("*FCC Pacifica Order*"). During his 12-minute monologue—broadcast at 2:00 in the afternoon—Carlin repeatedly used "fuck" and "shit" "in a variety of colloquialisms." See *FCC* v. *Pacifica Found.*, 438 U.S. 726, 729 (1978) (plurality opinion); see also *id.* at 751-55 (transcript of monologue). The FCC issued a declaratory order defining indecent speech as:

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[1] *See* Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1172-73 (original enactment); Communications Act of 1934, ch. 652, § 326, 48 Stat. 1064, 1091; Act of June 25, 1948, ch. 645, § 1464, 62 Stat. 683, 769, 866 (transferring the prohibition to the U.S. Criminal Code).

[2] *See, e.g., Robinson* v. *FCC*, 334 F.2d 534 (D.C. Cir. 1964); *Applications of E.G. Robinson*, 33 F.C.C. 250, 257, ¶ 22 (1962); *Applications of Pacifica Found.*, 36 F.C.C. 147, 150, ¶ 8 (1964).

> language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience.

FCC Pacifica Order, 56 F.C.C.2d at 97-98. Based on this definition, the FCC concluded that the broadcast was "indecent" and that the FCC could have imposed administrative sanctions against the station (although it did not). At the same time, however, the FCC clarified that, under its cautious enforcement policy, it would be "inequitable" to hold a licensee responsible for indecent language when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 59 F.C.C.2d 892, 893, ¶ 4 n.1 (1976) ("*Pacifica Reconsideration Order*").

This Court affirmed the FCC's finding that the George Carlin monologue, as broadcast over the radio in mid-afternoon, was indecent. See *Pacifica*, 438 U.S. 726. The opinion, however, was "an emphatically narrow holding," *Sable Communications*, 492 U.S. at 127, limited to the "verbal shock treatment" caused by the repeated use of expletives in the specific broadcast at issue. *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). Indeed, Justices Powell and Blackmun, who supplied the crucial votes for *Pacifica*'s 5-4 majority, explained that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61 (Powell, J., concurring); see also *id.* at 750 (opinion of the Court) ("We have not

decided that an occasional expletive . . . would justify any sanction . . . ."). They stressed that the FCC does not have "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." *Id.* at 759-60 (Powell, J., concurring). Both Justices were concerned that the FCC's standard could lead broadcasters to self-censor protected speech, but they voted to uphold the FCC's order only because "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 756, 760, 761 n.4 (Powell, J., concurring).

For several decades following *Pacifica*, the FCC repeatedly reaffirmed the limited scope of the indecency ban through a cautious and self-restrained approach to enforcement. As the FCC explained:

> We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive . . . would justify any sanction . . . ." Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." . . . He specifically distinguished "the verbal shock treatment [in *Pacifica*]" from "the isolated use of a potentially offensive word in the course of a radio broadcast."

WGBH, 69 F.C.C.2d at 1254, ¶ 10 (1978). The FCC thus drew a distinction between isolated and fleeting expletives—which were not actionably indecent—and

uses of offensive language that rose to the level of "verbal shock treatment"—which were.

Significantly, throughout its post-*Pacifica* indecency enforcement actions, the FCC repeatedly held that fleeting, isolated or inadvertent expletives were not indecent. See *L.M. Commc'ns of S.C., Inc. (WYBB(FM))*, 7 FCC Rcd. 1595, 1595 (Mass Media Bureau 1992) (single utterance not indecent); *Applications of Lincoln Dellar for Renewal of the Licenses of Stations KPRL(AM) & KDDB(FM)*, 8 FCC Rcd. 2582, 2585, ¶ 26 (Audio Serv. Div. 1993) (single utterance not indecent because of "isolated and accidental nature of the broadcast").

In 1987, the FCC utilized three companion declaratory orders to articulate what it called its "generic enforcement policy" for broadcast indecency. See *Pacifica Found., Inc.*, 2 FCC Rcd. 2698 (1987), *aff'd sub nom. Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930 (1987), *aff'd in relevant part, rev'd in part sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703 (1987) (same subsequent history); *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. 2705 (1987) (same subsequent history). In these orders, the FCC clarified that speech could be indecent without use of the specific "seven dirty words" from the George Carlin routine, as long as the speech at issue was the functional equivalent of the intentional "verbal shock treatment" in that monologue. The FCC recognized that an "analysis of whether particular speech is indecent cannot turn on a mechanistic classification of language," *Infinity Broad. Corp.*, 2 FCC Rcd. at 2705, ¶ 8, and it reaffirmed that isolated or fleeting utterances would not be considered actionable. *Id.* at 2705, ¶ 7 ("Speech that is indecent must involve more than the

isolated use of an offensive word."); *Regents of the Univ. of Cal.*, 2 FCC Rcd. at 2703, ¶ 3 (same). Indeed, these declaratory orders all involved repeated and intentional broadcasts of material that the FCC deemed to be indecent under its generic standard; none presented the question of whether non-repetitive utterances violated § 1464.[3] Thus, the FCC's adoption of the "generic" standard wrought no substantive change in its indecency enforcement policy with respect to isolated utterances.

The FCC reaffirmed its restrained approach in a 2001 policy statement, in which it announced a two-part test for assessing whether language is "indecent":

> First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.

Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999, 8002, ¶¶ 7-8 (2001) ("*Indecency Policy Statement*"). It identified several factors as relevant in assessing

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[3] *See, e.g.*, *Pacifica*, 2 FCC Rcd. at 2700, ¶¶ 19-22 (describing radio broadcast of excerpts from the play "The Jerker," which included repetitive uses of "shit" and "fucking" and graphic descriptions of anal sex); *Regents of the Univ. of Cal.*, 2 FCC Rcd. at 2703, ¶ 4 (quoting lyrics to song "Makin' Bacon"); *Infinity Broad. Corp.*, 2 FCC Rcd. at 2706, ¶ 11 (quoting excerpts from Howard Stern broadcasts that included, *inter alia*, discussions of testicles, penis size, and being "sodomized by Lambchop, you know that puppet Sherri Lewis holds").

whether language was "patently offensive" under the second prong:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

Id. at 8003, ¶ 10 (emphasis omitted). These factors restated in summary form the criteria the FCC had been applying all along to determine when broadcasts were, in context, so patently offensive that they were actionably indecent. In essence, the *Indecency Policy Statement* articulated the factors the FCC used to decide when an utterance amounted to "verbal shock treatment." Importantly, these factors reaffirmed that the policy on indecency would not reach merely isolated or fleeting instances of potentially objectionable language except in the most extreme and obvious cases.[4] Instead, the FCC would continue to target only those broadcasts that severely shocked the listener with offensive content. *Id.* at 8010, ¶ 20 (quoting *Pacifica*, 438 U.S. at 757 (Powell, J., concurring)).

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[4] The only examples of such fleeting but indecent references that the FCC identified in the *Indecency Policy Statement* involved graphic descriptions of intercourse with children or egregiously graphic and offensive descriptions of sexual activity, *see Indecency Policy Statement*, 16 FCC Rcd. at 8009-10, ¶ 19—*i.e.*, utterances that, even though they were not repeated, nonetheless amounted to verbal shock treatment and thus satisfied the patent offensiveness requirement.

2. In 2004, the FCC abruptly reversed course. During a live broadcast of the "Golden Globe Awards," the singer Bono declared that his receipt of an award was "really, really fucking brilliant." *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4976, ¶ 3 n.4 (2004) ("*Golden Globe Awards Order*"). Under longstanding precedent, this isolated and fleeting expletive clearly was not "indecent," as the FCC's Enforcement Bureau recognized in its initial ruling on the broadcast. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd. 19859, 19861, ¶ 6 (Enforcement Bureau 2003). The full FCC, however, reversed the Enforcement Bureau's decision, expressly overruled previous FCC decisions to the contrary, and stressed that "[t]he fact that the use of [an indecent] word may have been unintentional is irrelevant." *Golden Globe Awards Order*, 19 FCC Rcd. at 4979, ¶ 9 (overruling prior holdings that "isolated use of expletives is not indecent" and disavowing prior statements to the contrary, including the *FCC Pacifica Order*); see also *id.* at 4980, ¶ 12 n.32 (overruling cases cited in the *Indecency Policy Statement*). The FCC understood that its action in the *Golden Globe Awards Order* was a sharp break with its longstanding restrained enforcement policy, and it therefore declined to issue a penalty for the violation because "existing precedent would have permitted this broadcast." See *id.* at 4981, ¶ 15.

The FCC's unexpected expansion of the ban on "indecency" in the *Golden Globe Awards Order* created considerable shock and uncertainty among broadcasters about the scope of the new policy. This

confusion was exacerbated by subsequent enforcement decisions that were afflicted with numerous inconsistencies. For example, the FCC found that the unedited broadcast of the movie *Saving Private Ryan* was not actionable, even though it contained numerous, repeated uses of the words "fuck" and "shit" and their variants. This ruling was based on the agency's subjective assessment that deleting such expletives would have "altered the nature of the artistic work." *Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 FCC Rcd. 4507, 4513, ¶ 14 (2005) ("*Saving Private Ryan Order*"). The FCC offered no explanation for its disparate treatment of different broadcasts that used the same words, other than vague assertions that it took "context" into account.

Recognizing that its dramatic expansion of the indecency regime had created widespread confusion and uncertainty, the FCC issued an Omnibus Order in 2006 with the express goal of "provid[ing] substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard" by making findings about approximately 30 television programs with a "broad range of factual patterns." *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 2664, 2665, ¶ 2 (2006) ("*Omnibus Order*") (J.A. 27). However, the *Omnibus Order* merely made the problems facing broadcasters more acute. For example, the FCC found that the Martin Scorsese-produced documentary *The Blues: Godfathers and Sons*, in which blues musicians uttered expletives, was indecent because the agency "disagree[d] that

the use of such language was necessary to express any particular viewpoint in this case." *Id.* at 73. In its indecency analysis, the FCC made no distinction between *The Blues: Godfathers and Sons*, where the expletives were found to be unnecessary, and *Saving Private Ryan*, where the expletives were found to be "integral to the film's objective." *Saving Private Ryan Order*, 20 FCC Rcd. at 4512, ¶ 14. Broadcasters thus were left to guess whether their programming choices would be sanctionable. Not surprisingly, they have chosen to engage in self-censorship. See J.A. 251-53.

3. In the *Omnibus Order*, the FCC concluded that Fox's broadcasts of the 2002 and 2003 "Billboard Music Awards" violated § 1464. During the 2002 live broadcast, Cher received an award and spontaneously said that "People have been telling me I'm on the way out every year, right? So fuck 'em." J.A. 86. During the 2003 live broadcast, presenter Nicole Richie deviated from the script and ad-libbed, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* at 91. The FCC found both broadcasts to be actionably indecent, even though the potentially offensive language in both was unscripted and it was undisputed that Fox had no knowledge or intention that the words would be broadcast. *Id.* at 88, 94. The FCC did not, however, issue notices of apparent liability against these two broadcasts for the express reason that both broadcasts pre-dated the *Golden Globe Awards Order* and were not actionable under prior precedent. *Id.* at 91, 97-98.[5]

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[5] The FCC also found uses of the word "bullshit" over several episodes of ABC's *NYPD Blue* and use of the word "bullshitter" during a live interview on CBS's *The Early Show* to be indecent. J.A. 101-03, 106-07.

Fox, along with other broadcasters, petitioned for review of the *Omnibus Order* in the Second Circuit, arguing *inter alia* that the FCC's dramatic change in its indecency policy lacked an adequate explanation and that the FCC's application of its new policy was arbitrary and capricious. The FCC sought and received a voluntary remand in return for a stay of the Commission's enforcement of its new indecency policy. On remand, the FCC reaffirmed its indecency findings against Fox's broadcasts. *Complaints Regarding Various Television Broads. Between Feb. 2., 2002 & Mar. 8, 2006*, 21 FCC Rcd. 13299, 13321, ¶ 53 (2006) ("*Remand Order*") (Pet. App. 112a-13a).[6] Surprisingly, and despite having consistently acknowledged that the *Golden Globe Awards Order* represented a sea change in its approach to indecency regulation, the FCC remarkably claimed on remand that it had never changed its indecency policy with respect to isolated and fleeting expletives. *Id.* at 79a. The FCC adopted this stance despite having explicitly acknowledged the change in the *Omnibus Order* itself. See J.A. 102 ("[I]n the *Golden Globe Awards Order*, the Commission reversed precedent that had suggested that the isolated use of an offensive word like the "F-Word" is not indecent."). The FCC also recast contrary prior precedent as mere

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[6] The FCC reversed its decision in the *Omnibus Order* with respect to *NYPD Blue* because it determined there had been no legitimate complaints from viewers in a time zone in which the program aired prior to 10 p.m. Pet. App. 130a. Regarding *The Early Show*, the FCC reversed its earlier conclusion that the use of an offensive word during a news program contributed to the indecency finding, reasoning on remand that broadcast of an offensive word during a news program actually militated *against* an indecency finding. *Id.* at 128a. At the same time, the FCC has stressed that "[t]o be sure, there is no outright news exemption from our indecency rules." Pet. App. 127a.

"staff letters and dicta," Pet. App. 79a, and even implied that the issue of isolated and fleeting expletives had been one of first impression in the *Golden Globe Awards Order*. *Id.* at 80a. The FCC also contended, for the first time, that it could have imposed a fine on Fox based on prior FCC decisions, though it chose not to. *Id.* at 113a.

4. Following the remand, the Second Circuit by a vote of 2-1 granted Fox's petition for review. In its brief on appeal, the FCC abandoned its stated position that it had not changed its indecency enforcement policy. Pet. App. 22a. Accordingly, the Second Circuit undertook to discern whether an acceptable justification existed for the reversal of course in a *Remand Order* that had refused to acknowledge any such change. The primary justification identified by the court was the FCC's "first blow" theory—the claim that even an isolated and fleeting expletive constituted an immediate "blow" to the broadcast audience that the FCC could prohibit. *Id.* at 25a. The Second Circuit rejected this rationale for several reasons. First, the FCC had provided "no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." *Id.*

Second, and more importantly, the first blow theory made sense only if the FCC presumed that mere exposure to potentially offensive language harmed the broadcast audience. The FCC nonetheless permitted some isolated and fleeting expletives if, for example, they occurred during a "*bona fide* news interview," such as the isolated use of the word "bullshitter" in *The Early Show*. The FCC also permitted multiple uses of expletives, such as in *Saving Private Ryan*, when in the agency's judgment

the expletives (including multiple uses of the words "fuck" and "shit") were deemed "integral" to the broadcast. The FCC had not explained how it made those determinations or why such broadcasts constituted lesser "blows" that the broadcast audience should be permitted to suffer, thereby undermining the first blow theory as a justification for sanctioning some but not all fleeting expletives. Pet. App. 26a-28a. The Second Circuit also identified other purported justifications to which the *Remand Order* made "passing reference"—including, for example, the supposed difficulty of distinguishing expletives from literal descriptions of sexual or excretory functions and the FCC's fear that broadcasters would air isolated expletives at all hours of the day—but it found those rationales insufficient as well. *Id.* at 29a-31a.

After concluding that the FCC had failed to articulate a reasoned justification for the change in its indecency policy, the Second Circuit declined to rule on any of the other arguments Fox had raised. In particular, the Second Circuit did not consider Fox's statutory argument that the FCC's indecency findings were invalid because Fox did not have the requisite *scienter* required by § 1464. See Pet. App. 18a. The Second Circuit also did not rule on Fox's First Amendment claims, although it did offer some observations on these issues to guide the FCC on remand in a section expressly labeled as dicta. *Id.* at 35a-43a & n.12.

Judge Leval dissented. He too recognized that the FCC had, in fact, changed its indecency policy. Pet. App. 47a. In his view, however, the FCC had adequately explained the change with respect to the word "fuck," based on his belief that that word "conveys an inescapably sexual connotation." *Id.* at

49a. Judge Leval did not consider the FCC's policy with respect to the word "shit," although he strongly suggested that he did not consider that term to be indecent. *Id.* at 59a n.18 (reasoning that "there is an enormous difference between censorship of references to sex and censorship of references to excrement" because, "[f]or children, excrement is a main preoccupation of their early years"). And even though Judge Leval would have rejected Fox's administrative law challenges to the new indecency regime, he inexplicably declined to address Fox's statutory and constitutional challenges. *Id.* at 60a n.19.

SUMMARY OF ARGUMENT

The FCC's regulation of indecency has for decades been characterized by restraint and caution. A central feature of that restrained approach was the principle that offensive language would be deemed "indecent," and subject to sanction, only if it was intentionally repeated "over and over" or otherwise constituted in light of its context a form of "verbal shock treatment." *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). Mere isolated or fleeting instances of objectionable language could rarely satisfy this standard. Thus, the FCC sought to ensure that only the most egregious and shocking broadcasts would be punished and that the First Amendment rights of broadcasters would thereby be respected.

The FCC has abandoned that restrained approach. It now holds that certain words—at least "fuck" and "shit"—are inherently indecent and subject to sanction without regard to whether they are intended and repeated. The FCC has, in short, abrogated its cautious enforcement policy and now willy nilly punishes utterances that fall far short of the "verbal shock treatment" that for decades described what was

necessary to satisfy the requirement that language be "patently offensive."

Petitioners have not explained this shift in agency policy. In the *Remand Order*, the FCC in fact denied that any change had occurred, asserting instead that isolated and fleeting expletives have always satisfied the definition of "indecent," notwithstanding prior FCC holdings to the contrary. Under *Chenery*, that should be the end of the matter because to suggest that there has been no shift in approach by the FCC is utterly insupportable. See *CBS Corp.* v. *FCC*, No. 06-3575, 2008 WL 2789307, at *12 (3d Cir. July 21, 2008). Petitioners at least acknowledge to this Court that a change has occurred, but they continue to mischaracterize the new policy as merely taking greater account of "context." They neither address nor attempt to justify the actual change in policy regarding fleeting and isolated expletives.

None of the reasons offered by petitioners in support of the *Remand Order* bears a rational connection to the agency's actual policy shift. *First*, the supposed need to take greater account of "context" cannot justify the new policy because the old policy already treated context as a critical consideration in assessing indecency. *Second*, the purported need to protect children from even the "first blow" of offensive language cannot support the FCC's current *ad hoc* approach, which prohibits expletives in certain broadcasts (*The Billboard Music Awards*) but permits them in numerous others (*Saving Private Ryan*). *Third*, although petitioners argue that the FCC's prior enforcement approach granted broadcasters a "blanket exemption," allowing them to broadcast isolated expletives throughout the day without repercussion, there is no evidence that broadcasters abused the latitude embodied in this

purported "exemption." Nor is there any record basis for predicting that broadcasters would change their decades-long restraint in airing expletives. In short, nothing in the agency's order or in petitioners' *post hoc* effort to defend the new FCC approach explains the Commission's decision to abandon its decades-long restrained reaction to fleeting and isolated expletives in favor of a presumptively unforgiving understanding of what words are, in context, "indecent."

The agency's failure to offer *any* reasonable explanation for its policy shift is even more egregious in light of the significant constitutional issues involved. While petitioners would have the Court ignore those issues, the regulation of "indecent" speech necessarily implicates core First Amendment values, and the administrative law analysis simply cannot be divorced from the constitutional one. A change in policy that results in the restriction of a greater amount of speech—as the change in this case undoubtedly does—must be justified not only by a "reasoned explanation," *Massachusetts* v. *EPA*, 127 S. Ct. 1438, 1463 (2007), but also by proof that the policy represents the "least restrictive" means to address a real, established harm, *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 811-15 (2000); *Indecency Policy Statement*, 16 FCC Rcd. at 8000, ¶ 3. The FCC has not offered any such proof, and its misguided pleas for agency deference cannot be reconciled with the constitutional problems posed by the FCC's new regime.

Indeed, as the Second Circuit suggested in dicta, the FCC's expanded policy is unconstitutional. In the 30 years since *Pacifica*, legal and technological developments have eroded the underpinnings of the *Pacifica* decision, which make an expansion of the

indecency regime especially suspect. Moreover, the recent development of filtering technologies, such as the V-Chip, gives consumers and parents the ability to block objectionable materials from their televisions, rendering FCC regulation of indecency unnecessary. Finally, recent decisions of this Court have made clear that the FCC's test for indecency is overbroad and unconstitutionally vague. See *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997).

The Second Circuit was correct in holding that the FCC failed utterly to offer a rational explanation for its change in policy. It pointed to the profoundly chilling effect of the FCC's new regime—especially for live television—and it correctly observed that the FCC's approach to regulating broadcast indecency likely contravenes the First Amendment. The judgment of the court of appeals should be affirmed.

ARGUMENT

I. THE COMMISSION DID NOT GIVE A REASONED EXPLANATION FOR ITS CHANGE IN POLICY.

Agency action will be set aside as "arbitrary and capricious" under the Administrative Procedure Act ("APA") if the agency does not provide a "reasoned explanation" for its judgment. *Massachusetts* v. *EPA*, 127 S. Ct. at 1463. The agency must consider the relevant statutory factors, assess the available evidence, examine the ramifications of its decision, and "articulate a satisfactory explanation for the action[,] including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency order that does not provide a reasoned explanation for a change in policy must be vacated, notwithstanding any *post*

hoc efforts to justify the decision. *Massachusetts* v. *EPA*, 127 S. Ct. at 1463; see also *State Farm*, 463 U.S. at 50 ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (citing, *inter alia*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)). And, although an agency normally receives *Chevron* deference for its statutory interpretations and policy judgments,[7] here the FCC is entitled to no deference because its indecency regime poses grave constitutional issues. *Sable Communications*, 492 U.S. at 129. Simply put, the First Amendment trumps *Chevron*.

Petitioners concede that the FCC gave only three reasons to support its policy: (1) it replaces a purportedly *per se* rule with a contextual, case-by-case approach to fleeting expletives; (2) it protects listeners from the supposed "first blow" of potentially offensive words; and (3) it prevents the mythical risk that broadcasters would air isolated expletives more frequently. Pet. Br. 23-26. As explained below, however, petitioners continue to misstate the issue in this case. There was never a *per se* rule against liability for isolated expletives; the FCC's contextual approach that followed from *Pacifica* required that an utterance, whether repeated or not, constitute "verbal shock treatment." The FCC has now changed that standard without even frankly acknowledging the change, much less providing an adequate justification for it. Indeed, its only rationale that is even relevant to the actual change in policy is its stated goal of shielding children from ever hearing these words at

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[7] *See Chevron U.S.A., Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

all (*i.e.*, the "first blow" theory), but as the Second Circuit correctly held, this makes no sense as an explanation for the change, given that the FCC permits these words to be broadcast in a wide range of contexts.

Petitioners' other attacks on the Second Circuit's decision are equally meritless. This Court's precedents make clear that the FCC must explain what harms its new policy is meant to address, and the Second Circuit correctly held that the FCC had fallen far short of what both the First Amendment and the APA require. Similarly, the Second Circuit's criticism of whether any change in policy should be based on an asserted difficulty in distinguishing literal from non-literal uses of the words at issue was correct.

A. The FCC's Interpretation Of "Indecent" Under 18 U.S.C. § 1464 Is Not Entitled To Deference.

Petitioners ask this Court to treat this case like an ordinary administrative law case, and much of their argument is based on a plea for deference to agency judgment. See Pet. Br. 20 ("As this case comes to this Court it turns on the application of well-settled principles of administrative law"). They insist that courts are ill-equipped to assess the policy considerations underlying the concept of "indecent" under 18 U.S.C. § 1464, even though the FCC itself has not relied on any empirical evidence or research but only its own sense of what is indecent. See, *e.g.*, Pet. Br. 21-22, 39-40 (arguing that change in policy need not be supported by empirical evidence); Pet. App. 86a ("[I]n evaluating material, we rely on the Commission's collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest

groups, and ordinary citizens." (citation and internal quotation marks omitted)).

But this is not a run-of-the-mill administrative law case. The 800-pound gorilla in the corner of the room that petitioners choose to ignore is the First Amendment. The agency rule at issue here is not an economic regulation of widget manufacturing; it is a content-based restriction on protected speech. See *Playboy*, 529 U.S. at 811-12 ("indecent" speech is fully protected under the First Amendment); *Sable Communications*, 492 U.S. at 126 (same). The FCC's new policy prohibits substantially more protected speech than the old policy, and therefore deference must give way to a searching constitutional review of the new rules. Indeed, as explained in Section II below, there are serious constitutional objections to the FCC's regulation of indecency at all—objections that are far more serious today than they were in the 1970's when this Court decided *Pacifica*. Therefore, even if petitioners insist on framing their case as purely a matter of administrative law, it nonetheless would be improper even within this framework simply to assume that the substantial constitutional objections to the indecency enforcement regime did not exist, or that those constitutional issues do not undermine the FCC's claim to deference when it expands the scope of its indecency regime.

This Court has long recognized that, when a statute can reasonably be interpreted in either of two ways, one of which would raise serious constitutional doubts, the alternative interpretation *must* be adopted. *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("This cardinal principle . . . has for so long been applied by this Court that it is beyond debate."). It follows that, in cases implicating

significant constitutional concerns, an agency loses its freedom under *Chevron* to choose among all potentially "reasonable" methods of implementing a statute, but rather must select the most narrow permissible construction, to avoid any unnecessary conflict with the Constitution. *DeBartolo*, 485 U.S. at 575; cf. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). For this reason, traditional principles of agency deference simply have no place in a case such as this that presents serious constitutional questions. *Id.*[8]

In fact, deference to the FCC would be unwarranted in this case even under "standard" principles of administrative law. An agency's interpretation of a statute is accorded deference only when the agency has been granted exclusive responsibility for administering that provision. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990); *Dunn* v. *CFTC*, 519 U.S. 465, 479 n.14 (1997). But the statute at issue here, 18 U.S.C. § 1464, is a *criminal* provision. The FCC does not administer § 1464 exclusively; to the contrary, primary responsibility for enforcing criminal provisions lies with the Department of Justice. See 28 U.S.C. §§ 516, 547; see *Indecency Policy Statement*, 16 FCC Rcd. at 7999-8000, ¶ 2 n.2. And, moreover, this Court consistently has declined to defer to agency judgments regarding the interpretation of criminal statutes, even when the agency plays a role in their administration. *Gonzales*

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[8] *See also Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001) (deference is inappropriate when the agency's interpretation raises "significant constitutional questions"); *Miller* v. *Johnson*, 515 U.S. 900, 923 (1995) ("[W]e have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions.").

v. *Oregon*, 546 U.S. 243, 264 (2006); see also *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment).

In short, it would be difficult to find a situation when an agency has less of a claim to deference or more of a need for it, given its abrupt departure from prior precedent. But at the end of the day, the FCC must show that its indecency regime is permissible without the benefit of *Chevron* to support it.

B. The Change In Policy At Issue Has Nothing To Do With "Context" But Is A Substantive Modification Of The Definition Of "Indecent" Under 18 U.S.C. § 1464 That The FCC Has Failed To Explain.

Petitioners argue that the FCC's indecency policy has been changed merely to allow the FCC to take account of "context" when considering isolated expletives, supposedly to "harmonize" the FCC's consideration of such expletives with an overall approach to indecency that involves contextual judgments. *E.g.*, Pet. Br. 20-21, 23-24. But that is not what has happened at all. The FCC always considered "context" under the prior policy, even when considering words that were not repeated. The issue under the prior policy, however, was always whether, in context, the utterances were graphic, shocking, and egregious. What has changed is the substantive standard for what is indecent: the FCC's new policy punishes a wide range of speech that falls far short of "verbal shock treatment" by presuming that certain words, even in isolation, are indecent absent mitigating circumstances. And the FCC has yet to explain *that* change.

1. Context has always been a critical component of the FCC's stated indecency standard. The Commission's prior policy defined broadcast expletives as "indecent" only in egregious cases that were patently offensive. See *Indecency Policy Statement*, 16 FCC Rcd. at 8010, ¶ 20; *Citadel Broad. Co.*, 17 FCC Rcd. 483 (2002); *WGBH*, 69 F.C.C.2d at 1254, ¶ 10. To determine whether this standard was met, the FCC would look to the context in which the expletive was used and evaluate it in light of the *Indecency Policy Statement*'s articulated criteria: whether it was graphic and explicit, whether it was repeated or dwelled on sexual or excretory organs or activities, and whether it was pandering, titillating or shocking. *Indecency Policy Statement*, 16 FCC Rcd. at 8008-10, ¶¶ 17-20; see also *Peter Branton*, 6 FCC Rcd. 610 (1991); *Pacifica*, 2 FCC Rcd. at 2698-700, ¶¶ 8-16; *WGBH*, 69 F.C.C.2d at 1251, ¶¶ 5-7. Only if the language *in context* shocked the listener with offensive speech would it be deemed indecent. *Indecency Policy Statement*, 16 FCC Rcd. at 8008-10, ¶¶ 17-20.[9]

The FCC's approach flowed directly from *Pacifica*. The pivotal concurring Justices in that case found that the monologue at issue (George Carlin's "Filthy Words") could be classified as "indecent" only because "the language employed is . . . vulgar and offensive . . . [and] was repeated over and over as a sort of verbal shock treatment." 438 U.S. at 757 (Powell, J., concurring). Respecting the narrowness

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[9] *See also Indecency Policy Statement*, 16 FCC Rcd. at 8002, ¶ 9 ("In determining whether material is patently offensive, the full context in which the material appeared is critically important."); *Infinity Broad. Corp.*, 2 FCC Rcd. at 2705, ¶ 7 ("[W]hat is indecent is 'largely a function of context' . . . .") (quoting *Pacifica*, 438 U.S. at 742).

of the *Pacifica* decision, the FCC thus adopted a standard that ensured that potentially offensive utterances would not be indecent unless they rose to the level of "verbal shock treatment." *Indecency Policy Statement*, 16 FCC Rcd. at 8010, ¶ 20; see also *Pacifica*, 2 FCC Rcd. at 2699, ¶ 11 ("When making determinations as to whether certain speech is 'indecent,' we recognize and rely upon the Court's holding in *Pacifica* as setting forth the legal test for indecency."); *WGBH*, 69 F.C.C.2d at 1254, ¶ 10 ("We intend strictly to observe the narrowness of the *Pacifica* holding.").

Isolated or fleeting instances of offensive language rarely could meet this standard. No word was considered presumptively or *per se* indecent under this policy—even "fuck," see *Branton*, 6 FCC Rcd. at 610—so the only way that an offensive word could be deemed indecent was by reference to context, *i.e.*, if it was repeated or if other circumstances contributed to render its use the equivalent of "verbal shock treatment." *Indecency Policy Statement*, 16 FCC Rcd. at 8010, ¶ 20; see also Pet. App. 20a-21a (citing cases).[10] Numerous decisions accordingly refused to find expletives to be "indecent" if they were isolated or fleeting. *E.g.*, *Pacifica*, 2 FCC Rcd. at 2698-700, ¶¶ 3, 17-18 ("shit," "mother-fucker," "fuck"); *WGBH*, 69 F.C.C.2d at 1251, ¶ 2 ("shit," "bullshit"). In particular, the FCC displayed an appropriate sensitivity to context by declining to sanction fleeting, unintentional expletives during live broadcasts. *E.g.*,

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[10] *See also Pacifica*, 2 FCC Rcd. at 2699, ¶ 13 ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use is a requisite to a finding of indecency."); *Infinity Broad. Corp.*, 2 FCC Rcd. at 2705, ¶ 7 ("Speech that is indecent must involve more than the isolated use of an offensive word.").

L.M. Communications, 7 FCC Rcd. at 1595 (single utterance of "mother-fucker" during live and spontaneous programming not indecent); *Lincoln Dellar*, 8 FCC Rcd. at 2585, ¶ 26 (single utterance of "fucked" not indecent because of "isolated and accidental nature of the broadcast"). Nevertheless, in recognition of the importance of context, the Commission acknowledged that there were rare cases in which even an isolated offensive word could be indecent, if the circumstances of its use were so egregious as to be patently offensive. *Indecency Policy Statement*, 16 FCC Rcd. at 8009-10, ¶ 19 (providing examples).

Petitioners' contrary suggestion—that under the FCC's old policy "a single vulgar expletive could not be found indecent, no matter how strongly other contextual factors weighed in favor of such a finding" Pet. Br. 17—is simply incorrect. Context has always been the touchstone of the FCC's indecency policy, with repetition being merely one aspect of that analysis. *E.g.*, *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930, 932, ¶ 16 (1987) ("[T]he question of whether material is patently offensive requires careful consideration of context[, including] an analysis of whether allegedly isolated material is isolated or fleeting . . . ."), *aff'd in relevant part, rev'd in part sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988). The FCC itself conceded in the order under review that "[w]e have long recognized that 'even relatively fleeting references may be found indecent' if the context makes them patently offensive." Pet. App. 85a. The FCC's change in the indecency policy has nothing to do with harmonizing its approach to "context."

If anything, the new standard actually takes *less* account of context than did the old one. Under the

prior approach, a word would not be deemed indecent unless and until the Commission had undertaken an examination of the context in which it was presented, to decide whether it amounted to "verbal shock treatment." *Indecency Policy Statement*, 16 FCC Rcd. at 8010, ¶ 20. Under the new approach, in contrast, certain words (such as "fuck" and "shit") are presumed indecent unless the FCC can identify factors that in the view of a majority of the Commissioners mitigate the language's offensiveness. *See Golden Globe Awards Order*, 19 FCC Rcd. at 4979, ¶ 9. Context is thus no longer a necessary consideration in assessing whether an expletive is "indecent"; rather, it becomes relevant only if the broadcaster raises it as an affirmative defense. *See id.* at 4978, ¶ 8 ("[G]iven the core meaning of the 'F-Word,' any use of that word or a variation, *in any context*, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.") (emphasis added).

The issue in this case thus is not whether context should be part of the indecency analysis—it always has been—but whether the FCC has adequately explained its decision to modify the definition of "indecent" by abandoning a standard limited to "verbal shock treatment" in favor of an indecency presumption that must be rebutted with specific mitigating circumstances. Invoking the supposed need for "contextual analysis" cannot justify this change.

2. The only rationale the FCC has offered that is logically relevant to its actual change in policy is the notion that the old standard did not adequately protect children from the "first blow" of inappropriate speech. Pet. App. 84a-85a. The "first blow" theory has become shorthand in this case for the FCC's view

that children should be shielded from hearing these words at all. Certain expletives, the FCC has said, can "enlarge[] a child's vocabulary in an instant," *id.*, and thus even isolated or fleeting uses of these words should be prohibited. Pet. Br. 25-26.

But, as the Second Circuit held, this explanation makes no sense in light of the FCC's actual policy. Pet. App. 25a-28a. First, it still begs the question; the FCC has never explained "why it ha[d] changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." *Id.* at 25a.[11] Equally important, the "first blow" theory posits that *any* exposure to improper language will cause harm to children, by expanding their vocabulary and introducing them to concepts beyond their emotional maturity. *Id.* Yet, the FCC has consistently acknowledged that it has no authority to ban *all* instances of offensive language, regardless of context. *Id.*

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[11] Indeed, the FCC's argument was derived from a passage in *Pacifica* in which the Court was addressing the very different question of the constitutional relevance of what it found at the time to be the broadcast media's "uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748-49 ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."). In this analogy, the Court was not equating isolated words with "blows"; indeed, its opinion made clear that it was not considering whether the isolated use of potentially offensive words could be deemed to be "indecent" at all. Instead, the passage merely addressed the fact that, at the time of *Pacifica*, parents lacked the means to filter out broadcasts that might contain material they deemed objectionable for children--a fact that is no longer the case. *See infra* Part II.B.

In practice, the FCC has approved broadcasts that contain numerous expletives, even under its new policy. For example, the FCC has held that repeated uses of the words "fuck" and "shit" during the film *Saving Private Ryan* were not "indecent" because, in context, their use was necessary to "realistically reflect the soldiers' strong human reactions to . . . th[e] unspeakable conditions and the peril in which they find themselves." *Saving Private Ryan Order*, 20 FCC Rcd. at 4512, ¶ 14. It also held that an isolated use of the term "bullshitter" during *The Early Show* was not indecent because it occurred as part of a "*bona fide* news interview." Pet. App. 127a-28a. Children may have been present during the airing of either of these programs—particularly *The Early Show*, see J.A. 105—and would have been exposed to this language. Yet, the FCC found that the language in *Saving Private Ryan* and *The Early Show* was not indecent, while the same language in the *Billboard Music Awards* was. The only explanation offered for the divergent results in these cases was the different "contexts" in which the words at issue were used.

These "contextual" distinctions, however, are entirely lost on children. They cannot distinguish between the use of an expletive in a Shakespearean drama and in an awards show; either program presents the same risk of exposure. A child is just as likely to ask a parent "what fucking meant," J.A. 19, after hearing the word during *Saving Private Ryan* as after hearing it during the *Billboard Music Awards*.[12]

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[12] As the Second Circuit noted, the FCC conceded during oral argument that:

> a broadcast of oral argument in this case, in which the same language used in the Fox broadcasts was repeated multiple times in the courtroom, would "plainly not" be indecent or

Accordingly, the "first blow" theory, as an explanation, is irrational and simply has no fit with the FCC's actual policy as it is applied across numerous cases. While the "first blow" theory might explain a blanket ban on all expletives (which would be independently unconstitutional), it bears no "rational connection" to the FCC's current *ad hoc* approach. See *State Farm*, 463 U.S. at 52. Indeed, the notion that selectively draconian enforcement of § 1464 could be effective in achieving the goal of shielding children from ever hearing fleeting expletives is quixotic, given that children today are exposed to potentially offensive words from many sources other than broadcast television. *CBS, Inc.* v. *DNC*, 412 U.S. 94, 127 (1973) ("sacrifice [of] First Amendment protections for so speculative a gain is not warranted"). The notion that a child watching "South Park" on Comedy Central (carried by a cable television system) could or would distinguish that program from what he or she watches on an over-the-air broadcast channel (also carried by that very same cable system) is completely fanciful.

In this light, petitioners' revisionist use of "context" merely confuses the issue. The question here is not whether context is relevant to indecency but whether the "first blow" concept can justify the Commission's new policy of regulating fleeting expletives. If the goal is to protect children from the expansion of their

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profane under its standards because of the context in which it occurred. The Commission even conceded that a rebroadcast of precisely the same offending clips from the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC, even though in those circumstances viewers would be subjected to the same "first blow" that resulted from the original airing of this material. Pet. App. 26a-27a.

vocabulary that accompanies exposure to even an isolated use of an offensive word, petitioners' argument that indecency must be gauged by context is simply not responsive.

3. The FCC's mantra of "context" is, in reality, a plea for unbridled discretion. The FCC is no longer restricting itself to cases of highly sexual, graphic and shocking material. Rather, under the guise of contextual analysis, it is picking and choosing among a wide variety of mainstream programming, with no discernible standards to guide its discretion or to inform broadcasters of the bounds of acceptable speech. Compare J.A. 71-74 ("fuck" and "sh[illegible]" during the documentary *The Blues: Godfathers and Sons* indecent), with *Saving Private Ryan Order*, 20 FCC Rcd. at 4513, ¶ 16 ("fuck" and "shit" during the film *Saving Private Ryan* not indecent). The order under review is indicative of this approach, prohibiting isolated expletives uttered by awards recipients or presenters during live coverage of an awards program but not one said by an interview subject during a live morning show. Pet. App. 117a-22a, 125a-28a. There is simply no way for broadcasters to determine under this new standard whether and when language will be deemed indecent, and broadcasters have reacted by engaging in significant self-censorship. *E.g.*, *Saving Private Ryan Order*, 20 FCC Rcd. at 4508-09, ¶ 4 (noting that more than a quarter of ABC affiliates refused to broadcast *Saving Private Ryan*, "citing their uncertainty as to whether it contained indecent material [in light of recent] Commission indecency rulings"); see also Mike Musgrove, *Sinclair Puts 9/11 Show In Late-Night Time Slots*, Wash. Post, Sept. 2, 2006, at D1 ("Sinclair Broadcast Group . . . will delay airing a documentary about the terrorist attacks of Sept. 11, 2001 . . . to avoid the risk of incurring fines

from the Federal Communication Commission over indecent language.").

The risk is particularly great with respect to live programming, in which the FCC's new standard makes broadcasters responsible for words unexpectedly blurted out "with no opportunity for journalistic editing." *Pacifica Reconsideration Order*, 59 F.C.C.2d at 893, ¶ 4 n.1. Even when broadcasters employ expensive technology to try to prevent the inadvertent broadcast of potentially offensive words, there remains an irreducible risk that such words will be broadcast. See Second Circuit Joint Appendix, Vol. I, at A-329, A-337 (describing possibility of human error and unnecessary censorship). The prospect of stiff fines or other sanctions pressures broadcasters to forgo live coverage of events, reducing the immediacy and quality of programming available to the public. Indeed, the record before the FCC was replete with examples of how the new policy has jeopardized the viability of live broadcasting. See *id.* at A-324-25 (describing effects of new policy on live programming); *id.* at A-332-34 (describing effects of new policy on sports programming); *id.* at A-336-38 (describing effects of new policy on live entertainment programming); J.A. 251-53 (citing examples of programs that were self-censored, including some live programs).

In that regard, *Pacifica* does not support the FCC's use of "context," as that term is applied case-by-case. First, both the plurality and the concurring opinion in *Pacifica* made clear that the Court was not addressing "cases involving the isolated use of a potentially offensive word." 438 U.S. at 760-61 (Powell, J., concurring). If anything, *Pacifica* strongly implies that fleeting expletives generally cannot satisfy the definition of "indecent." *Id.* at 757;

see *Indecency Policy Statement*, 16 FCC Rcd. at 8010, ¶ 20 (adopting this view); *Pacifica*, 2 FCC Rcd. at 2699, ¶ 13 (same).

Equally important, petitioners misinterpret *Pacifica*'s references to "context." The plurality's discussion of "context" was concerned mostly with the time of the broadcast, the nature of the program, and its likely audience (particularly whether that audience included children). *Pacifica*, 438 U.S. at 750 (opinion of the Court). The Court has never endorsed the FCC's current conception of "context," in which it scrutinizes one mainstream show after another and makes essentially editorial or perhaps even moral judgments about whether isolated words were or were not necessary to an artistic or socially valuable message (on pain of multimillion dollar fines). Cf. *E. Educ. Radio*, 24 F.C.C.2d 408, 413, ¶ 13 (1970) (§ 1464 "does not mean . . . that the Commission could properly assess program after program, stating that one was consistent with the public interest and another was not. That would be flagrant censorship").

Where regulatory enforcement has such a clear and profound chilling effect on speech, it is especially important that the FCC provide a reasoned and compelling explanation for its enforcement policy and, of course, for any change in that policy. To date, it has not.

4. It is a measure of how far the FCC has strayed from what is constitutionally permissible that petitioners now argue that the new policy is necessary to adhere more closely "to the text of the governing statute, which prohibits the broadcast of '*any* . . . indecent . . . language,'" Pet. Br. 25. This argument is specious for two reasons. First, the assertion that, because 18 U.S.C. § 1464 prohibits

"any" indecent language, the FCC must regulate fleeting expletives assumes that fleeting expletives necessarily constitute "indecent . . . language," when in fact the statute says no such thing. 18 U.S.C. § 1464. The statute says only that, when language is deemed "indecent," any and all broadcasts of that language are prohibited. *Id.*; see also *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). The statute does not define "indecent," and the word "any" sheds no light on its meaning nor explains the FCC's shift in policy.

More importantly, if *Pacifica* means anything, it emphasizes that the Constitution does not permit the FCC to read § 1464 as expansively as possible. Limiting the FCC's authority under § 1464 to cases amounting to "verbal shock treatment" is a vitally important check that ensures that the FCC stays within constitutional bounds and avoids chilling protected speech. That petitioners would read the term "any" in § 1464 as they would in an ordinary statute speaks volumes about the extent to which the FCC has lost sight of First Amendment values in this context.[13]

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[13] Petitioners' novel argument that the passage of the Broadcast Decency Enforcement Act of 2005 ("BDEA"), Pub. L. No. 109-235, 120 Stat. 491 (2006), supports the FCC's dramatic expansion of its indecency enforcement regime is meritless. Pet. Br. 26 n.4. The BDEA did nothing more than increase the penalties for indecency violations; that legislation never addressed the substantive scope of the FCC's indecency policy. The legislative history of the BDEA thus provides no basis for reinterpreting § 1464, especially given that "[t]he views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress." *Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968). In all events, the FCC did not rely on this argument in its order and therefore cannot defend it based on the BDEA now. *Chenery*, 332 U.S. at 196.

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At base, petitioners miss the point. They refuse to acknowledge that the change in policy at issue is not a greater focus on "context" but a modification of the substantive definition of "indecent," adopting a presumption that certain words are inherently indecent absent mitigating circumstances, and jettisoning their past sensitivity to the particular context of spontaneous and unexpected utterances during live broadcasts. None of the reasons offered by the Commission in its order explains or justifies this new approach. The Commission's policy, and the order under review, are therefore "arbitrary and capricious" under the APA.

C. The Other Justifications To Which The Order Under Review Made "Passing Reference" Do Not Justify The FCC's New Policy.

Attempting to give the FCC the benefit of the doubt, the Second Circuit also considered other possible justifications for the newly expanded indecency policy to which the FCC made "passing reference" in the *Remand Order*. Pet. App. 29a. Petitioners now attack the Second Circuit's analysis of two of those additional, possible justifications—concerning the FCC's failure to identify what harms the new policy is meant to address and whether non-literal uses of the words at issue can be indecent—but both of these arguments lack merit.

1. The FCC has yet to explain adequately what harms its new policy is intended to address. The closest petitioners come is their claim that the FCC's third reason for changing its policy was to avoid creating a "blanket exemption" for isolated expletives, which would allow "broadcasters to air expletives at

all hours of a day so long as they did so one at a time." Pet. Br. 26, 37. It should be emphasized at the outset that this would not be a justification for changing the substantive indecency standard itself, because the FCC would still have to justify why a one-at-a-time expletive was indecent. But even as an explanation of the "harm" the new policy is meant to address, the claim is meritless for several reasons.

Most fundamentally, the FCC has not come to grips with what the First Amendment requires. The FCC's new policy punishes much more speech than the old policy did. In such circumstances, the FCC must demonstrate that the harm it seeks to remedy through its change in direction is real, not merely conjectural or speculative. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994). The FCC also must show that its change in course will in fact remedy the problem it has identified. *Playboy*, 529 U.S. at 819-23, 825. The FCC's new policy imposes restrictions on a broader range of protected speech, leading to far greater self-censorship. The First Amendment (as well as the APA) requires the FCC to identify, with specificity, the benefits to society that justify these costs.[14]

The FCC has not even tried to carry its burden on this point. In the order under review, the FCC claimed that it had not changed its policy—thus

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[14] *See* J.A. 251-53 (detailing recent examples of self-censorship); cf. *Pacifica Found.* v. *FCC*, 556 F.2d 9, 17 & n.19 (D.C. Cir. 1976) (prior to the FCC's promises of restraint, the *Pacifica* court of appeals observed that the FCC's decision "would prohibit the broadcast of Shakespeare's *The Tempest* or *Two Gentlemen of Verona*" along with "certain passages of the Bible" and the "works of Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift, and the Nixon tapes").

allowing it to assume that no new showing of harm was necessary because it could rely on previous conclusions in *Pacifica* and other cases. Pet. App. 79a-80a, 113a; *id.* at 22a & n.6. Now that it has been forced on appeal to concede that it has changed its policy, the FCC argues that harm to society from fleeting expletives "has already been presumed by Congress," because "Congress's intent [to prohibit fleeting expletives] is clear." Pet. Br. 40.

This claim borders on the frivolous, and nothing in the cases petitioners cite supports the FCC's claim that it may simply "presume" harm from fleeting expletives. See Pet. Br. 40-41. Certainly *Pacifica* provides no such support, given that the Court emphasized that it was not even reaching the question whether the FCC had the authority to regulate isolated words. *Ginsberg* involved obscenity, not indecency, and the Court recognized that it was unnecessary to base obscenity regulation on a showing of harm or "antisocial consequences" because obscene speech, unlike indecent speech, is "not protected expression." *Ginsberg* v. *New York*, 390 U.S. 629, 641 & n.9 (1968). *ACT III* did not assess the government's interest in regulating isolated expletives but instead merely accepted that the government had a sufficiently compelling interest in regulating speech that the court assumed was equivalent to "hard-core pornography." *Action for Children's Television* v. *FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) ("*ACT III*"). Moreover, both *Ginsburg* and *ACT III* involved constitutional challenges to speech regulations, and the quantum of evidence required to defend a statute from a constitutional challenge differs from that demanded of an expert agency obligated to "examine the relevant data and articulate a satisfactory

explanation for its action." *State Farm*, 463 U.S. at 43.

Thus, the Second Circuit correctly faulted the FCC for an order that was "devoid of any evidence that suggests that a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation." Pet. App. 32a. As the court of appeals held, the *Remand Order* "provides no reasoned analysis of the purported 'problem' it is seeking to address with its new indecency policy from which this court can conclude that such regulation is reasonable." *Id.* at 32a-33a (citing cases). Contrary to petitioners' suggestion, such a showing is a critical prerequisite to any expansion of the ban on indecent speech.

Equally important, the Second Circuit correctly found that the FCC's concern that broadcasters' use of isolated expletives might increase unless restrained by FCC sanctions is not supported by the record. Pet. App. 30a. In the *Remand Order*, the FCC worried that, unless isolated and fleeting expletives were deemed to be indecent, broadcasters could "as a matter of logic" air offensive words one at a time, all day long. But there was no *evidence* in the record to give credence to that concern: as the Second Circuit noted, the FCC admitted that broadcasters had "never barraged the airwaves with expletives even prior to *Golden Globes*." *Id.* at 30a. More tellingly, the FCC conceded in the *Remand Order* that, even though broadcasters are free to air expletives during the indecency safe harbor between 10 p.m. and 6 a.m., broadcasters very rarely air such language. *Id.* at 86a-87a.[15]

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[15] Although Judge Leval suggested that broadcasters might increase the use of expletives because of a desire to compete

Nor can petitioners supply new evidence here to try to bolster what they now claim is a "predictive judgment" instead of a mere "matter of logic." Pet. Br. 38. Such evidence violates the cardinal principle that agency decisions must be evaluated "solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Chenery*, 332 U.S. at 196.[16]

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with cable networks not subject to indecency regulation, Pet. App. 56a-57a, the FCC has never suggested that this is the case, and there was nothing in the record to support Judge Leval's speculation. *See id.* at 30a n.11 (argument barred by *Chenery*, 332 U.S. at 196). Indeed, if such pressure to compete with cable in the use of the words "fuck" and "shit" really existed, one would expect to hear such words frequently after 10:00 p.m. on broadcast stations today; after all, there is nothing to stop the networks from airing shows like the "The Sopranos" (or even more graphic programming) during the safe harbor. In fact, however, the broadcast of such words during the safe harbor is extremely rare. *Id.* at 86a-87a.

[16] Even if the studies now cited by petitioners could properly be considered, they would not substantiate the FCC's worry about an increase in offensive language like "fuck" and "shit." Both of the studies cited by petitioners concluded that "offensive" language had increased on broadcast television only by counting milder words that the FCC has expressly held are not indecent. *Compare* Barbara K. Kaye & Barry S. Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, 7 J. Mass. Commc'n & Soc'y 429, 435 (2004) (counting, *e.g.*, "hell" and "damn"), *and* Parents Television Council, *The Blue Tube: Foul Language on Primetime Network TV* 2 (2003), *available at* http://www.parentstv.org/PTC/publications/reports/stateindustrylanguage/stateoftheindustry-language.pdf (counting, *e.g.*, "hell" and "damn"), *cited in* H.R. Rep. No. 109-5, at 2 (2005), *with* J.A. 137 (finding "hell" and "damn" not indecent), *and Complaints By Parents Television Council Against Various Broad. Licensees*

In truth, broadcast stations are much like newspapers that seek a very wide audience; although the First Amendment protects the *Washington Post*'s right to print the word "fuck" on every page of its paper every morning, there is plainly no imminent possibility that it will begin to do so (even though it competes, in some sense, with much racier print fare). As the Second Circuit concluded, the FCC simply has not identified any real-world "problem" that would justify the FCC's expanded prohibition on indecency. *State Farm*, 463 U.S. at 41-42.

2. Likewise, there was no error in the Second Circuit's remand to reconsider whether non-literal uses of the words at issue are indecent. Pet. Br. 33. Although considerable ink has been spilled on this topic, petitioners correctly recognize that this issue is largely beside the point here. In particular, petitioners concede that they are *not* relying on this point as a justification for the FCC's change in policy. *Id.* at 23-26. Rather, as petitioners note, whether non-literal uses of the word "fuck" have a sexual connotation is relevant only to the question of whether such uses fall within "the first part of the two-part indecency test"—*i.e.*, whether the utterance at issue constitutes a reference to "sexual or excretory organs or activities" in the first place. *Id.* at 33. Petitioners thus candidly acknowledge that even if

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Regarding Their Airing of Allegedly Indecent Material, 20 FCC Rcd. 1931, 1938 ¶ 8 (2005) (finding words including "hell" and "damn" "do not represent graphic descriptions of sexual or excretory organs or activities such that the material is rendered patently offensive by contemporary community standards for the broadcast medium"). The studies cited by petitioners therefore do nothing to bolster the FCC's concern that broadcasters will suddenly abandon their own editorial standards and begin broadcasting the words "fuck" and "shit" one at a time throughout the day.

everything the FCC and Judge Leval have said about the linguistics of the word "fuck" is correct, the FCC is still left with the task of justifying its change of policy with regard to the second prong of the indecency standard—*i.e.*, whether the material is "patently offensive."

With respect to *that* issue, petitioners admit that whether the word is used literally or non-literally is an important factor in determining whether the utterance satisfies the "patently offensive" prong of the indecency test. Pet. Br. 36-37. There is no dispute in this case that, prior to the FCC's adoption of its new policy, isolated uses of the word "fuck" or "fucking" in a non-sexual manner would almost never be sanctioned—*i.e.*, such uses are not "explicit" or "graphic," they do not "dwell on" descriptions of sexual activities, nor are they "pandering" or "titillating." *Id.* at 22-23; *Indecency Policy Statement*, 16 FCC Rcd. at 8003, ¶ 10. Accordingly, even assuming, as the FCC asserts, that non-literal uses of the word "fuck" always have a sexual connotation and thus fall within the first part of the test, the agency still must explain why it has changed the second part of the test such that it can sanction non-literal "fleeting expletives" that do not amount to "verbal shock treatment."[17]

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[17] Respondent agrees with the Second Circuit that the FCC lacked any record evidence for its new view that every non-literal use of words like "fucking" or "bullshit" constitutes a reference to sexual or excretory organs or activities. In fact, the FCC's recent approach to words derived from scatological or sexual roots has been wildly inconsistent. *See, e.g.*, *NBC Telemundo License Co.*, 19 FCC Rcd. 23025 (2004) ("ass" and "crap" not indecent); *Complaints by Parents Television Council Against Various Broad. Licensees Regarding the Airing of Allegedly Indecent Material*, 20 FCC Rcd. 1920 (2005) ("dick," "dickhead," "pissed," and "ass" not indecent); *Complaints by*

In any event, the Second Circuit correctly found that the FCC's statement that it had to ban non-repeated, non-literal uses of the words "fuck" and "shit" because it is "difficult (if not impossible)" to distinguish literal from non-literal uses defies common sense. Pet. App. 29a. No reasonable person would have any difficulty concluding that the quoted statements from Bono, the President, and the Vice-President were non-literal. *Id.* at 29a-30a. On remand, the agency simply must reevaluate whether any change in policy can be justified on the basis of its extremely implausible assertion that it is impossible to distinguish the literal from the non-literal.

II. THE FCC'S CURRENT INDECENCY REGIME IS UNCONSTITUTIONAL.

In their petition for certiorari, petitioners contended that the decision of the court of appeals conflicts with this Court's constitutional holding in *Pacifica*, Pet. 15-19, and that this case warrants further review because the court of appeals predicted that the FCC could not "adequately respond to the constitutional . . . challenges" raised below, *id.* at 27 (quoting Pet. App. 45a). Yet having invoked the constitutional dimensions of this dispute at the certiorari stage, petitioners' brief on the merits now strenuously insists that the Court cannot consider those issues at all. Pet. Br. 42-43.

There is good reason for (and much irony in) petitioners' evasiveness—any examination of the

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Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material, 20 FCC Rcd. 1931 (2005) ("dick," "crap," "pissed" not indecent); J.A. 98-105, 132-36, 143-45 ("dick," "dickhead," "ass," and "pissed off" not indecent).

constitutional issues in this case would reveal that the FCC's current indecency regime is patently unconstitutional, and for more than one reason.[18] There is little question that the evolution of the contemporary media marketplace since the time of *Pacifica* has eroded the essential premises of that decision. Technological developments, like the advent of the V-Chip, now provide less restrictive alternatives to the FCC's content-based regulation of speech. And, the inherent indeterminacy of the FCC's current approach to broadcast indecency is unconstitutionally vague—a conclusion that follows directly from this Court's rejection of an almost identically framed indecency standard in *Reno*, 521 U.S. 844.

A. The Evolution Of The Contemporary Media Marketplace Has Eroded *Pacifica*'s Essential Premises.

In *Pacifica*, this Court recognized the FCC's authority over non-obscene broadcast speech based on two key features of 1970's-era broadcast television, but sweeping technological and cultural changes have since eroded both of the foundations on which *Pacifica*'s holding depended.

First, while the broadcast media may have enjoyed "a uniquely pervasive presence in the lives of all Americans" in 1978, *Pacifica*, 438 U.S. at 748 (opinion of the Court), that is no longer so in 2008. A central feature of this "unique pervasiveness" was the fact that "broadcasting—unlike most other forms of

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[18] Respondent NBC addresses the First Amendment issues posed by the FCC's indecency regime in more detail. No point would be served by parroting that presentation. Thus, the First Amendment analysis here is intended to emphasize arguments that warrant particular focus.

communication—comes directly into the home . . . ." *Id.* at 759 (Powell, J., concurring); *see also id.* at 748-49 (opinion of the Court). In today's media marketplace, however, the great majority of households invite television signals into their homes through cable or satellite subscription services. Pet. App. 106a-07a (noting that almost 86% of television households subscribe to cable or satellite service). The number of households that principally rely on cable or satellite to receive television programming is only expected to increase in 2009 when broadcasters abandon the analog spectrum and convert to digital signals. See Seth Sutel, *Digital-TV switch boon for business*, Seattle Times, Feb. 19, 2008, at E2, *available at* 2008 WLNR 3350789.

In other words, the vast majority of Americans today watch broadcast stations side by side with hundreds of cable channels that are not bound by the FCC's indecency rules. Given the array of alternative media now available to the average consumer and the variety of roles these alternative media play, it is simply no longer the case that broadcasting has a "*uniquely* pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748 (opinion of the Court) (emphasis added).

Second, broadcasting is no longer "uniquely accessible to children." *Id.* at 749. Children today can just as easily obtain access to indecent material through cable or satellite television or the Internet as they can through broadcasting. As more and more traditional audio and video content is delivered by means of the Internet, broadcasting will become even less unique in its accessibility to children.

Given the myriad media platforms available, it is unlikely that the FCC's indecency regulations will significantly advance the FCC's asserted interest in

shielding children from indecent material. When the government acts to restrict speech, the First Amendment requires that the measures at issue "in fact alleviate [the identified] harms in a direct and material way." *Turner Broad.*, 512 U.S. at 664. A restriction on speech violates the First Amendment when it "provides only the most limited incremental support for the interest asserted." *Bolger* v. *Young Drug Prods.*, 463 U.S. 60, 73 (1983). See also *FCC* v. *League of Women Voters*, 468 U.S. 364, 396 (1984) (finding regulation of broadcast speech that provides ineffective or remote support for the government's purpose is invalid).

These technological and cultural changes have eroded *Pacifica*'s two rationales for permitting content-based regulation of indecent broadcast speech. Given that all of the relevant trends are undermining the foundations of *Pacifica*, the FCC plainly has no justification for *expanding* its regulation of indecency beyond the bounds recognized in 1978.

B. New Technologies Like The V-Chip Provide Less Restrictive Alternatives To The FCC's Content-Based Regulation Of Protected Speech.

Today, a wide range of new technologies permit viewer control over television programming that simply did not exist in 1978 when *Pacifica* was decided. The vast majority of viewers receive television service through multichannel providers, like cable TV or satellite service, that offer their own parental control technologies. Digital video recorders permit viewers to build their own lists of "approved" programming. Most importantly, the V-Chip enables broadcast television viewers to block objectionable or "indecent" programming from entering their homes.

FCC, *V-Chip: Viewing Television Responsibly* (updated July 8, 2003) ("*V-Chip Information*"), *available at* http://www.fcc.gov/vchip. The V-Chip allows parents to use a standardized rating system to pre-set their televisions to block the content of programming and ensure that their children are not exposed to potentially offensive language or other content they may deem inappropriate.

The availability of the V-Chip renders the FCC's content-based regulation of indecent speech on broadcast television unconstitutional. Content-based restrictions on broadcast programming, such as bans on "indecent" materials, are constitutional only if they are "narrowly tailored." *Reno*, 521 U.S. at 879. To be "narrowly tailored," a regulation must represent the "least restrictive" means to address the relevant governmental interest. *Playboy*, 529 U.S. at 811-15. In other words, out of all available alternatives for satisfying the government's objective, the approach chosen must restrict the least amount of speech. *Id.* "[I]f a less restrictive means is available for the Government to achieve its goals, the Government *must* use it." *Id.* at 815 (emphasis added); see *Turner Broad.*, 512 U.S. at 641-42; *Pacifica*, 438 U.S. at 748 (opinion of the Court); see also *League of Women Voters*, 468 U.S. at 395, 398-99. Further, the First Amendment does not demand that an alternative to a content-based regulation be perfect or immune from criticism in order for it to constitute an effective, less restrictive alternative. *See Playboy*, 529 U.S. at 824; *Sable Communications*, 492 U.S. at 128.

Applying these principles, this Court has repeatedly invalidated complete bans on "indecent" speech when technological alternatives allow consumers to block offensive speech from entering

their homes. *Id.* at 126; *Playboy*, 529 U.S. at 815; *Ashcroft* v. *ACLU*, 542 U.S. 656, 666-67 (2004). Indeed, this Court has already suggested that the V-Chip is a feasible and effective alternative to a ban on indecent speech. *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 755-56 (1996).

Although the FCC has contended that some programs might not be correctly rated, see Pet. App. 109a-10a, petitioners cannot on that basis simply dismiss the V-Chip as an effective alternative to a content-based ban on speech. This Court has made clear that the First Amendment does not demand that an alternative to a speech-restrictive regulation be perfect or absolutely impervious to assault or evasion:

> It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and *a court should not presume parents, given full information, will fail to act.*

Playboy, 529 U.S. at 824 (emphasis added); *see also Sable Communications*, 492 U.S. at 128 (fact that "enterprising youngsters could and would evade the rules and gain access to [indecent] communications" did not establish that rules were ineffective). The FCC has not established that the V-Chip is a systematically ineffective means of giving viewers control over what content comes into their homes—control that was not technologically available in 1978 when *Pacifica* was decided.

When the FCC can achieve its aims by providing consumers with the ability to block particular content they find offensive, without prohibiting the speech

itself or precluding others from willingly receiving it, the Constitution precludes a partial or total ban on the speech. *Ashcroft*, 542 U.S. at 667 ("Filters are less restrictive than [bans on indecent speech because they] impose selective restrictions on speech at the receiving end, not universal restrictions at the source."); see also *Playboy*, 529 U.S. at 814-15 ("[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protections can be accomplished by a less restrictive alternative."). Simply put, "[t]argeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." *Id.* at 815. The V-Chip is less restrictive than a complete ban on "indecent" speech, and it is equally effective in protecting consumers and children; the FCC therefore "must use it." *Id.*

C. The FCC's Current Indecency Standard Is Impermissibly Vague.

The FCC's dramatic expansion of its indecency enforcement regime means that it is no longer limiting its indecency fines to truly shocking and outrageous content—*e.g.*, the George Carlin routine at issue in *Pacifica*. Rather, the FCC is now targeting an array of mainstream broadcasts that fall far short of "verbal shock treatment." See *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). The FCC is not applying any predictable or even discernible standards but rather is picking and choosing which of these mainstream shows to punish based on wholly subjective notions of what is "patently offensive" according to an undefined "community standard for the broadcast medium," or whether the disputed material is "integral" to the message or artistic goals

of the program. The FCC simply has no business trying to make these distinctions: it is well-settled that the government cannot use such vague standards in regulating constitutionally protected speech. See, *e.g.*, *Reno*, 521 U.S. at 874; see also *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974).

In *Reno*, this Court unanimously concluded that the indecency standard in the Communications Decency Act of 1996 ("CDA"), Pub. L. No. 104-104, 110 Stat. 133, was unconstitutionally vague. See *Reno*, 521 U.S. at 870-74. The CDA defined indecency as any "communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Id.* at 860 (quoting 47 U.S.C. § 223(d)). That definition, however, is almost word-for-word identical to the FCC's "indecency" standard, with all of the same elements:

> First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. Second, the material must be patently offensive as measured by contemporary community standards for the broadcast medium.

Pet. App. 71-72a. In *Reno*, this Court squarely held that such a broad restriction on speech is unconstitutional. 521 U.S. at 870.

When confronted with *Reno*, the FCC points to a different portion of that opinion, addressing a different issue, in which the *Reno* Court distinguished *Pacifica*. Pet. App. 104a. *Reno* was the first case involving the Internet to reach this Court, and the government there attempted to establish the principle that the Internet should be treated exactly

like broadcasting and therefore subject to regulation under *Pacifica*. *Reno*, 521 U.S. at 868. Although the Court rejected that specific argument, *id.* at 868-70, that holding had nothing to do with the separate question whether the content-based regulation of speech was unconstitutionally vague (an issue *Pacifica* did not address with respect to indecent broadcasting). Whatever the characteristics of the medium and the appropriate level of First Amendment scrutiny, vagueness is an independent constitutional doctrine, and no regulation—of any medium—is permissible if it fails to give speakers adequate notice of what can and cannot be said. According to *Reno*, the very terms the FCC uses in its indecency definition would "unquestionably silence[] some speakers whose messages would be entitled to constitutional protection." Pet. App. 38a.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 1, 2008

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RESPONDENT'S BRIEF

American Bar Association
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No. 07-582

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CENTER FOR CREATIVE VOICES IN MEDIA, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Center for the Creative Community, Inc. d.b.a. Center for Creative Voices in Media, Inc. ("Center") respectfully submits this corporate disclosure statement:

The Center is a nonprofit corporation which does not issue stock. It is not a subsidiary or affiliate of any publicly owned corporation.

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In the Supreme Court of the United States

No. 07-582

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CENTER FOR CREATIVE VOICES IN MEDIA

STATEMENT OF THE CASE

1. Respondent Center for Creative Voices in Media ("Center") adopts the Counter Statement of Respondent Fox Television Stations, Inc. as supplemented herein.

2. Respondent Center is an organization dedicated to protecting and promoting the interests of its members, who create and provide artistic content for broadcast programs. The Center's members include writers, producers, actors, authors, and other creative professionals (collectively referred to as "creators").

3. The order here under review has had a substantial effect on the creative community. During the agency's reconsideration of its policies, Respondent Center submitted a white paper describing the impact of the FCC's revised policies upon the day to day activities of writers, producers and directors. This paper, entitled "*Big Chill: How the FCC's Indecency Deci-*

and Harm America's Children." is reproduced for the Court's convenience in the accompanying Addendum.

Creators are at the forefront in the actual process of creating and delivering speech. Although the Commission's enforcement proceedings are directed at licensees, the pressure of stiff indecency penalties is passed on to the artists who actually produce their programming. The inhibiting environment thus created directly interferes with the process of artistic and creative expression.

The constraint generated by the Commission's action affects creators in a number of ways. For example, in some instances, licensees have mandated that creators edit their programming simply as a precautionary measure. 21Add. The inevitable tendency to err on the side of caution means that the impact of the Commission's action is often broader that its plain language would suggest. In other cases, licensees have flatly refused to air certain programming for fear of being subject to complaints of indecent and profane programming. 5Add. Moreover, the vague and confusing nature of the FCC's actions has resulted in uncertainty as to what constitutes "indecent" programming.

Further, the fact that the statutory term "profanity" has never previously been the basis for Commission enforcement, much less given an independent meaning, has caused very widespread confusion in the artistic community. The freedom of creators to express themselves has been stifled because creators are now under a great deal of pressure to speculate as to how far their creativity and expression can reach before it constitutes an actionable complaint. The Commission's *Orders*, therefore, have resulted in a palpable chill on free speech. Without coherent and consistent guide-

lines as to what constitutes indecent and profane programming, creators are literally at a loss for words.

4. Respondent Center's members are also viewers and listeners of television and radio, albeit with a heightened interest in observing and building upon the work of other creators in their industry. Artists, be they painters, writers, playwrights, or television creators, do not work in isolation, but rather within the context of each other's works. Oftentimes, creators build upon or distinguish their work from their peers' works. Thus, a critical aspect of the creative process is to have access to diverse programming, which enables and fosters further creative expression.

5. Respondent Center's members are also "ordinary" viewers and listeners of broadcast programming. In their "off duty" and recreational viewing and listening by themselves and in the company of friends and family, they partake of television and radio just as the rest of the public does. As individual viewers and listeners, they are entitled to expect a diversity of creative expression. Instead, under the current indecency regime, viewers and listeners are being prevented from receiving access to protected speech and expression.

6. The Commission's *Orders* have, without explanation or logic, created an environment where viewers and listeners are prevented from receiving protected expression. Consequently, the *Orders* have interfered with their rights to have access to diverse sources of information, as is guaranteed by the Communications Act. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379-380 (1969).

SUMMARY OF THE ARGUMENT

Respondent Center concurs with the government and *Amici Curiae* Free Press, *et al.* and American Academy of Pediatrics, *et al.* that no constitutional questions are properly before the Court at this time.

The FCC's dramatically revised reinterpretation of the law merits lessened deference than is ordinarily afforded to agencies' statutory construction.

The Commission's decisions have created an unworkable, inconsistent, and confusing indecency regime, with vague and arbitrary standards. This is a very substantial departure from prior policy and precedent, for which the government has not offered a reasoned explanation.

As a consequence, creators, as producers of the programming aired by licensees, are directly and immediately impacted. The inconsistency of the FCC's decisions with prior precedent has left creators in a precarious position since they no longer have the ability to determine accurately what type of expression constitutes indecent speech. These actions have thus impermissibly stifled creative expression and caused adverse economic consequences for creators and performers.

ARGUMENT

I. THIS COURT NEED NOT, AND SHOULD NOT, CONSIDER CONSTITUTIONAL QUESTIONS AT THIS TIME.

Respondent Center concurs with the government that no constitutional questions are properly before the Court at this time. Brief for the Petitioners at 42-43. Furthermore, they strongly endorse the arguments of *Amici Curiae* Free Press, *et al.* and American Academy of Pediatrics, *et al.*, which demonstrate that this Court's holding in *Red Lion Broadcasting Co. v. FCC*, 395 U.S.

367 (1969), is not implicated by the FCC's action below or the Second Circuit's review thereof. Brief of Free Press, *et al.* at 6-42; Brief of American Academy of Pediatrics, *et al.* at 4-15.

II. THE FCC'S REVISED INTERPRETATION OF THE COMMUNICATIONS ACT IS NOT ENTITLED TO SUBSTANTIAL DEFERENCE.

While the government acknowledges that the FCC has reinterpreted key provisions of the Communications Act, it insists that "the APA requires only that it 'supply a reasoned analysis for the change.' [*Motor Vehicle Mfrs. Ass'n v.*] *State Farm* [*Mut. Auto Ins. Co.*, 463 U.S. 29,] 42 [(1983)]." Brief for the Petitioners at 21.

This recitation of the applicable standard understates the burden the government must meet in justifying the agency's actions below. The full sentence from which the government extracted the above quotation emphasizes that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change *beyond that which may be required when an agency does not act in the first instance.*" *State Farm* at 42 (emphasis supplied). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *General Electric v. Gilbert*, 125 U.S. 143 (1976). As is fully set forth in the brief of Respondent Fox Television Stations, Inc. the FCC's dramatically revised construction of longstanding interpretations is fraught with inconsistencies and does not merit high respect from this Court.

III. THE COMMISSION'S ACTION WAS VAGUE AND ARBITRARY.

The court of appeals correctly held that the FCC's actions were vague and arbitrary and failed to provide a reasoned explanation for departing from its own prior precedent. The FCC purports to give "substantial guidance to broadcasters and the public about the types of programming that are impermissible under [the] indecency standard." J.A. 27. However, the Commission's findings are inconsistent and contradict prior precedent. Moreover, the Commission has failed to articulate a rational explanation for its deviation from prior precedent. As a result, rather than being a model of clarity, the FCC's actions have instead left the creative community confused as to what constitutes indecent and profane programming.

For example, in 2003, the Commission overturned years of precedent in holding that an isolated broadcast of the expletive "fuck" during the live broadcast of the Golden Globes Awards show was indecent. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards," Memorandum Opinion and Order*, 19 FCCRcd 4975 (2004). In coming to its new stance, the Commission stated that "broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the 'F-Word' or a variation thereof in situations as that here." *Id.*, 19 FCCRcd at 4982. Thus, it would have seemed that creators should refrain from ever including in their works "the 'F-Word' or a variation thereof."

However, in 2005, the Commission determined that the repeated use of the same expletive, "fuck," in *Saving Private Ryan*, a work of fiction based on World

War II, was not indecent. *Complaints Against Various Broadcast Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," Memorandum Opinion and Order*, 20 FCCRcd 4507 (2005). According to the Commission, the use of the expletives in this case was justified and "essential to the ability of the filmmaker to convey to the viewers the extraordinary conditions" facing soldiers. *Id.*, 20 FCCRcd at 4512. The Commission found that "the expletives uttered by these men as these events unfold realistically reflect the soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves." *Id.* Thus, it would have seemed that creators could include expletives in their works, so long as the context justified the use.

In the matter under review the Commission appeared to abandon the *Saving Private Ryan* precedent, finding that the use of "fuck" and "shit," a handful of times, in the documentary *The Blues: Godfathers and Sons*, was indecent and profane. J.A. 70-79. In reaching this confusing result, the Commission found that the documentary was "unlike *Saving Private Ryan*, where [the Commission] concluded that deleting offensive words 'would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.'" J.A. 76. To the contrary, the Commission claimed that the educational purpose of the documentary "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." *Id.*

The Commission's action leave creators in the dark as to how a finding of indecency would be avoided

based on the merit of the program. Instead, creators have to rely on the subjective opinion of three Commissioners as to what constitutes merit-worthy programming and hope that their creative works are saved from a finding of indecency. This type of "guidance" is not only arbitrary and vague, but for creators, completely unworkable and unacceptable.

Another example of the effect of the Commission's arbitrary decision making was evident in PBS's attempt to broadcast an appropriate verison of Ken Burns' documentary *The War*. PBS officials attempted to seek guidance from the Commission to determine where they could draw the line with regard to some of the language used in the documentary, but were unable to get such guidance. 21Add. As a result, PBS released two different versions of the documentary because some stations feared Commission sanctions more than others. While PBS was willing to create two versions of *The War*, such vagueness can especially harm less well-known creators, whose work may simply be censored excessively or not even broadcast by stations who fear excessive fines, or the project may simply not be funded. Thus, while a broadcaster's confusion and resulting caution is understandable, its adverse impact on creators is no less unfortunate.

IV. THE COMMISSION'S DECISION IS CHILLING SPEECH AND STIFLING CREATIVE EXPRESSION.

The Commission's action has undermined creators' ability to engage in artistic expression. Additionally, because of the potential for hefty fines, creators and performers have also had to deal with economic setbacks.

A. The *Orders* Have a Significant Impact on Speech and Expression.

Under the unprincipled and arbitrary regime the Commission has enacted, creators have the difficult, almost impossible, task of trying to determine what type of programming the Commissioners will find acceptable. An incorrect decision could lead to hefty fines on broadcasters, and potentially, on creators. Moreover, the enactment of the Broadcast Decency Enforcement Act of 2005 has increased ten-fold the maximum penalty for broacasting obscene, indecent, or profane language, to $325,000. Pub.L. 109-235, 120 Stat. 491 (to be codified at 47 USC § 503(b)(2)(C)(ii). As a result, creative expression has been stifled because creators have been forced to edit, or even refrain from producing, certain programs.

For example, within days of the *Omnibus Order*'s release, acclaimed Emmy and Oscar winning producers Tom Fontana and Barry Levinson received a call from concerned WB Network executives about their pilot episode of *The Bedford Diaries*, a drama focusing on the lives of six contemporary New York City college students. 21Add. The premiere episode, which involved a group of students attending a class on human sexuality, had already been approved by WB's standards and practices department. 21Add. A week before the show was scheduled to air, the network ordered Fontana and Levinson to delete a number of specific scenes, including one that depicted two girls in a bar kissing on a date and another of a girl unbuttoning her jeans. 21Add.

Although Fontana refused to make the edits, the network itself exercised its right to air an edited version of the program. 21Add. WB executives publicly ac-

knowledged that the decision to censor Fontana's new show was entirely driven by concerns raised by the *Order* and that they did not believe the original cut of the episode was indecent. 21Add. Rather, the network says it acted "out of an abundance of caution." 21Add.

B. The *Orders* have Significant Economic Impact on Creators.

The FCC's actions have also have had an adverse economic impact on artists. While penalties are levied on licensees, ultimately it is the creators and performers who suffer the economic consequences of an indecent finding. Indeed, some creators have been forced to indemnify their employers. *See, e.g.*, Frank Ahrens, *Six-Figure Fines for Four-Letter Words Worry Broadcasters*, WASHINGTON POST, July 11, 2006, 2006 WLNR 11941250[1] Some have been forced to invest in indecency insurance policies in the event the Commission at some future date determines a program to be indecent or profane. *Id.* Thus, the findings adopted by the *Orders* put creators at risk not only creatively, but also economically.

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[1]For example, PBS has recently issued new guidelines for producers, including "the producer's warranty that its program complies with all necessary rights, technical requirements and FCC regulations, including the FCC's indecency rules" * * * The obligation to indemnify includes the cost of defending any indecency complaints and the cost of any fines or penalties imposed by the FCC." *See* Karen Everhart, *PBS wards off fines by fixing cartoons from distant past*, *at* http://www.current.org/fcc/fcc0618indecency.shtml (reproducing PBS guidelines).

V. THE COMMISSION VIOLATED THE RIGHTS OF VIEWERS AND LISTENERS TO ACCESS DIVERSE INFORMATION FROM A DIVERSITY OF SOURCES.

Creators are not the only ones affected by the *Orders*. The Commission's responsibility to ensure that public airwaves are used in the public interest includes the affirmative responsibility to ensure that the listening and viewing public has access to diverse sources of expression. *Red Lion*, 395 U.S. at 390; *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) (Ginsburg, J). However, the *Orders* censor expression that was not considered indecent before and does not provide a reasoned explanation as to the departure from prior precedent. As a result, the listening and viewing audience also suffers because it no longer has access to a wider array of speech.

For example, PBS recently had to face the very real dilemma of whether or not to rebroadcast *Eyes on the Prize*, the Peabody Award-winning documentary on the Civil Rights movement. 23-24Add.; *see also*, John Eggerton, *Washington Watch, Broadcasting & Cable*, 2006 WLNR 17464587; Gail Shister, *Shadow of Censorship Over 'Prize,' Philadelphia Inquirer*, September 20, 2006, 2006 WLNR 16276983. PBS was concerned over generating fines over one F-word used in the documentary. 22Add. Although PBS televised the very same the documentary in 1987 and 1993 without generating any fines, the FCC's new regime leaves doubt whether the documentary could now be considered indecent or profane.

Prior to the FCC's revised interpretation, creators had far greater certainty about how far they could push the envelope, and through their expression, they

could challenge and inspire other creators who viewed their work. However, the uncertainty surrounding the Commission's action denies creators the flexibility to express themselves due to the pressure and possibility of incurring fines for alleged indecent programming. As a result, creators may be unwilling to produce compelling or thought provoking programming, instead playing it safe with generic programming. Thus, as viewers, creators are now handicapped in their ability to receive such compelling or thought-provoking expression that would then allow them to build on or challenge such expression.[2]

CONCLUSION

For all these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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August 1, 2008

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[2]Moreover, the limits on permissible expression also harm "ordinary" viewers. These viewers are entitled "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion*, 395 U.S. at 390.

RESPONDENT'S BRIEF

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No. 07-582

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., CBS BROADCASTING INC., AND ABC, INC.

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QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. § 1464; *see* 47 C.F.R. § 73.3999, when the expletives are not repeated.

RULE 29.6 STATEMENT

NBC Universal, Inc. operates the NBC and Telemundo broadcast networks, as well as nonbroadcast television networks. NBC Universal, Inc. is owned by National Broadcasting Company Holding, Inc. (which is a wholly owned subsidiary of General Electric Company) and by Vivendi Universal, S.A., a publicly traded company.

NBC Telemundo License Company is the licensee or controlling parent entity of the licensees of several full-power television broadcast stations. It is a wholly owned subsidiary of NBC Telemundo, Inc., which is owned by both NBC Telemundo Holding Company (a wholly owned subsidiary of General Electric Company), and by NBC Universal, Inc.

General Electric Company has no parent company, and no publicly held company owns ten percent or more of its stock.

CBS Broadcasting Inc. states that CBS Corporation, a publicly held company, owns an interest of ten percent or more in CBS Broadcasting Inc.

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

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BRIEF OF RESPONDENTS NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., CBS BROADCASTING INC., AND ABC, INC.

Respondents respectfully submit that the judgment of the court of appeals should be affirmed.

STATEMENT

This is a case about the First Amendment. In 2004, the Commission created a regime of arbitrary, unjustified, and wholly unpredictable content-based restrictions under the guise of protecting children from "broadcast indecency"—notwithstanding the absence of such restrictions in the multitude of other media available to children. Parents have at their disposal a congressionally prescribed means of blocking unwanted broadcast content. Nevertheless, to suppress the occasional expletive that might slip through that filter, the Commission has concocted an indeterminate and infinitely malleable understanding of "indecency" that rejects as "no longer good law" any agency precedents that ever constrained that proscription in application.

The Commission's new indecency enforcement regime depends, in the first instance, largely on complaints mass-generated over the Internet by activist ideological groups determined to impose on the rest of the country their narrow sensibilities—views that, however sincerely they might be held, do not plausibly resemble any national community standard of what is "patently offensive." Whether broadcasters are exposed to millions of dollars in fines based on these "complaints" depends, ultimately, on the Commissioners' evaluation of each broadcast's "artistic merit"—which is to say, on their individual *tastes*. Not surprisingly, adjudications under this protean policy are demonstrably capricious; they flip and flop

only to flip back again and display a unique talent for drawing inexplicable lines. The Second Circuit was right to conclude that the Commission has not adequately justified this new and arbitrary policy, and it was also right to suggest that the policy is deeply at odds with basic First Amendment freedoms.

1. George Carlin's "Filthy Words" monologue was a 12-minute routine in which Carlin listed "the words you couldn't say on the public . . . airwaves" and "proceeded to list those words and repeat them over and over again in a variety of colloquialisms." *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978). After a daytime broadcast of "Filthy Words," the Commission invoked 18 U.S.C. § 1464, a criminal statute, which bars the utterance of "any obscene, indecent, or profane language by means of radio communication," and brought an enforcement action against the broadcaster. In that proceeding, the Commission articulated the following definition of broadcast indecency: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *In re Citizen's Complaint Against Pacifica Found. Station WBAI*, 56 F.C.C.2d 94, 97–98 ¶ 11 (1975). The Commission concluded that Carlin's monologue violated that standard.

Conceding that the "Filthy Words" monologue fit within the Commission's definition of indecent material, *see Pacifica*, 438 U.S. at 739, the broadcaster challenged the sanction on statutory and First Amendment grounds. This Court recognized that the words used in Carlin's monologue were not "out-

side the protection of the First Amendment," and that Carlin's "monologue would be protected in other contexts," but it upheld the Commission's sanction. The Court emphasized the "narrowness of [its] holding" and stated it "ha[d] *not* decided that an occasional expletive . . . would justify any sanction," much less "a criminal prosecution." *Id.* at 746, 750 (emphasis added). Carlin's monologue, however, was tantamount to "verbal shock treatment," and thus properly sanctionable. *Id.* at 760–61 (Powell, J., concurring).

In the years that followed, the Commission generally limited its enforcement actions to *sustained and repeated* uses of the "seven particular words that were broadcast in [the] George Carlin monologue." *New Indecency Enforcement Standards*, 2 F.C.C.R. 2726, 2726 (1987). Its enforcement policy was *not* aimed at programs that contained "merely an occasional . . . expletive, but instead" at content that "dwelt on sexual and excretory matters in a pandering and titillating fashion." *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 933 ¶ 20 (1987). Therefore, the Commission repeatedly ruled that the utterance of a single, fleeting expletive was not indecent. *E.g.*, *In re Applications of Lincoln Dellar*, 8 F.C.C.R. 2582, 2585 ¶ 26 (Audio Servs. Div. 1993).

In 2001, the Commission sought to clarify its indecency standard and to "provide guidance" to the broadcast community as to how it would be applied. *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8016 ¶ 30 (2001) ("*Industry Guidance*"). Echoing its decision in *Pacifica*, the Commission set out a two-part test for broadcast indecency: (1) "the material must describe or depict sexual or excretory

organs or activities," and (2) it must be "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶¶ 7–8. In measuring the offensiveness of any particular broadcast—the second step of its indecency test—the Commission informed broadcasters that it would look to three factors: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*." *Id.* at 8003 ¶ 10.

In accordance with that two-part definition, the *Industry Guidance* cites several cases where the disputed broadcast was determined *not* to be indecent, either because the language, in context, did not "inescapabl[y]" have a "sexual import," or because the sexual or excretory reference was "fleeting and isolated." 16 F.C.C.R. at 8006, 8008–09 ¶¶ 15, 18 (citing cases).

2.a. The Commission's approach to fleeting expletives changed abruptly and dramatically after NBC's 2003 live broadcast of the *60th Annual Golden Globe Awards*. Accepting an award, Bono exclaimed: "This is really, really, fucking brilliant. Really, really great." *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (2004) (*Golden Globe II*). The Commission received 234 complaints about this statement, though all but 17 were mass-generated by a single advocacy group, the Parents Television Council. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18

F.C.C.R. 19,859, 19,859 ¶ 2 (E.B. 2003) ("*Golden Globe I*").[1]

The Commission's Enforcement Bureau denied all complaints. *Golden Globe I*, 18 F.C.C.R. at 19,862 ¶ 7. Applying the indecency standard as it had long been understood, the Bureau held that although "[t]he word 'fucking' may be crude and offensive . . . in the context presented here, [it] *did not describe sexual or excretory organs or activities*. Rather, the performer used the word 'fucking' as an adjective or expletive to emphasize an exclamation." *Id.* at 19,861 ¶ 5 (emphasis added). The Bureau also noted the Commission's consistent view that "fleeting and isolated remarks of this nature do not warrant Commission action." *Id.* at 19,861 ¶ 6.

The Commission, however, reversed the Bureau's decision and introduced a fundamentally new interpretation of its indecency standard. *Golden Globe II*, 19 F.C.C.R. at 4975–82. In lieu of analyzing whether Bono's words actually depicted or described sexual or excretory activity—as required by the first step of the Commission's test—the Commission held that "*any* use of [the 'F-Word'] or a variation, in *any* context, inherently has a sexual connotation." *Id.* at 4978 ¶ 8 (emphases added). The Commission also flatly declared that its previous contrary precedent was "no longer good law." *Id.* at 4980 ¶ 12. The entire broadcasting industry sought reconsideration of

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[1] The Parents Television Council screens television programs and then blankets cyberspace with e-mails about content it finds objectionable. The mass e-mails draw traffic to the Council's website, where anyone can submit a complaint to the Commission—whether the complainant has viewed a program or not. *See, e.g.*, Parents Television Council, *File an FCC Broadcast Indecency Complaint*, http://www.parentstv.org/PTC/fcc/fcccomplaint.asp (last visited July 31, 2008).

this radical departure from established practice, but the Commission has never acted on those petitions, thus foreclosing judicial review of *Golden Globe II*.

b. In 2006, the Commission issued a new ruling, the Omnibus Order, in which the Commission applied to an entirely new set of programs the indecency standard it announced in its unreviewed decision in *Golden Globe II*. Jt. App. 24–178. The Commission adjudicated as "indecent" the broadcast of fleeting expletives in four programs:

- The isolated use of the word "bullshit" by a New York City detective in episodes of ABC's *NYPD Blue*. *Id.* at 98–105.
- The single use of the word "bullshitter" during a live news interview on CBS's *The Early Show*. *Id.* at 105–09.
- A single, unscripted use of the phrase "fuck 'em" by Cher during a live broadcast by FOX of the *2002 Billboard Music Awards*. *Id.* at 86–91.
- An unscripted moment during FOX's live broadcast of the *2003 Billboard Music Awards*, during which presenter Nicole Richie stated, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* at 91–98.

c. Several broadcasters filed petitions for review in the court of appeals, seeking judicial review of the Commission's "new approach." *Golden Globe II*, 19 F.C.C.R. at 4982 ¶ 15. Faced with that prospect, the Commission asked the Second Circuit to remand the case so the Commission could "reconsider" its order in light of the "constitutional and statutory challenges" raised by the broadcasters. Despite the long administrative pendency of the broadcasters' identi-

cal challenges to the order in *Golden Globe II*, these challenges were apparently so new and surprising to the Commission that it sought leave from the court of appeals "to address the petitioners' argument[s] in the first instance." Mot. for Voluntary Remand at 2, 4, 5. A remand, the Commission declared, would enable the Second Circuit "to cleanly address the important constitutional and statutory arguments presented by this case without procedural detours." Reply in Supp. of Joint Mot. for Voluntary Remand at 10. The Second Circuit accepted the Commission's representations and remanded the case to the Commission. Pet. App. 15a.

On remand, in the shadow of judicial review, the Commission changed course yet again and reached altogether new—and different—conclusions about the purported "indecency" of the various programs addressed in the Omnibus Order. Where in the Omnibus Order the Commission opined that the word "bullshitter" "invariably invokes a coarse excretory image," and that the broadcast of this word *was* patently offensive and indecent, "*particularly* during a morning news interview," in the Remand Order the Commission concluded that the *same word* was not "actionably indecent" *precisely because* it was broadcast as part of a news interview. *Compare* Jt. App. 106–07 (emphasis added) *with* Pet. App. 128a.

More fundamentally, although *Golden Globe II* expressly acknowledged that it was changing agency policy, and even though the Omnibus Order also expressly confirmed that *Golden Globe II* had changed the law, the Remand Order dismissed those statements and discovered that the Commission's interpretation had not changed at all. *See* Pet. App. 80a–81a. Based on that revisionist reading of the regulatory history, the Commission affirmed its ear-

lier conclusion that Fox's live broadcasts of the 2002 and 2003 Billboard Music Awards were actionably indecent. *Id.* at 62a.

The Commission also rejected the broadcasters' constitutional challenges to the Commission's indecency determinations. The Commission held that its definition of broadcast indecency was not unconstitutionally vague, notwithstanding this Court's rejection of a materially identical definition of indecency in *Reno v. ACLU*, 521 U.S. 844 (1997). Pet. App. 104a. The Commission also concluded that, under a "relaxed level of First Amendment scrutiny," (*id.* at 105a) its content-based restriction of broadcasters' speech passed constitutional muster. *See id.* at 109a–112a. And while the Commission acknowledged that "[t]he V-chip provides parents with some ability to control their children's access to broadcast programming," it relied on several studies from outside the administrative record to conclude that the V-chip was inadequately effective at limiting children's access to indecent material. *Id.* at 109a, 112a.

3.a. The court of appeals granted the petition for review and vacated the Remand Order. Pet. App. 46a. Accepting the first of the broadcasters' several administrative-law, statutory, and constitutional arguments, the court held that "the Remand Order is arbitrary and capricious because the Commission's regulation of 'fleeting expletives' represents a dramatic change in agency policy without adequate explanation." *Id.* at 18a.

The court of appeals recognized that there were two aspects to the Commission's about-face: First, the Commission changed its view as to the *meaning* of the "F-Word" and the "S-Word"—from a view that evaluated whether the words were used to "depict" or "describe" sexual or excretory activities, to a view

that, "*in any context*," invariably deemed the "F-Word" and the "S-Word" to depict or describe such activity. Pet. App. 31a (quoting *Golden Globe II*, 19 F.C.C.R. 4975, 4978 ¶ 8). Second, the Commission changed its view of the *offensiveness* of the "F-Word" and the "S-Word"—from the view that a single, isolated utterance was very unlikely to rise to the level of "patently offensive," to the view that any use of the word was *presumptively* patently offensive and thus "presumptively indecent." *Id.* at 15a.

The court of appeals rejected the Commission's attempt to explain its new policy on the basis of the purported "difficult[y]" in "distinguish[ing] whether a word is being used as an expletive or as a literal description of sexual or excretory functions." Pet. App. 83a. That "defie[d] any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any 'sexual or excretory' meaning." *Id.* at 29a.

The court of appeals also was not persuaded by the Commission's argument that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" Pet. App. 84a (quoting *Pacifica*, 438 U.S. at 748–49). This failed to explain "why [the Commission] has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*," or why the Commission was willing to "subject[] [viewers] to the same 'first blow'" when it deemed the program to have sufficient social value. *Id.* at 25–27a.[2]

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2 The court of appeals also rejected the "Commission's new approach to profanity," finding it to be "supported by even less

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Having concluded "that the FCC's new indecency regime . . . is invalid under the Administrative Procedure Act," the court of appeals did not decide definitively "the various constitutional challenges . . . raised by the Networks." Pet. App. 34a–35a. The "interest of judicial economy" nevertheless compelled the court to state its "skeptic[ism] that the Commission['s] . . . 'fleeting expletive' regime would pass constitutional muster" even if it were adequately explained. *Id.* at 35a. The court of appeals observed that this Court had "struck down as unconstitutionally vague a similarly-worded indecency regulation of the Internet," and expressed "skeptic[ism] that the FCC's identically-worded indecency test could nevertheless provide the requisite clarity to withstand constitutional scrutiny." *Id.* at 37a–38a (citing *Reno*, 521 U.S. at 844).

Moreover, the court of appeals observed that the rationale for reviewing content-based restrictions of broadcasters' speech under a "relaxed" level of scrutiny had eroded in the 30 years since *Pacifica*. Although *Pacifica* had justified the "broadcast is different" strand of First Amendment review on the ground that broadcast television is "uniquely pervasive" and "uniquely accessible to children," (438 U.S. at 748, 749), the court noted that "it is increasingly difficult" to accept this proposition in the technological metropolis of the 21st Century. But even "beyond the mechanistic application of strict scrutiny," the court noted, the fact that "blocking technologies such as the V-chip have empowered viewers to make their

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[Footnote continued from previous page]
analysis, reasoned or not," and to reflect an unreasonable construction of the statutory term "profane." Pet. App. 33a, 45a. The Commission does not seek review of those determinations. *See* Pet. 11 n.2.

own choices about what they do, and do not, want to see on television" "may obviate the constitutional legitimacy of the FCC's robust oversight" of broadcast indecency.

b. Judge Leval dissented in part. He rejected the Commission's view that the "S-Word" and other excretory references could be regulated as indecent, reasoning that "censorship" could be justified only by "potential . . . harm to children resulting from indecent broadcasting." Pet. App. 59a n.18. Exposure to the "S-Word," he believed, did not cause that type of harm because "excrement is a main preoccupation of [children's] early years." *Id.* "[R]eferences to sex," on the other hand, did pose a sufficiently serious threat to children to warrant "censorship." *Id.* As to sex, Judge Leval opined that the Commission had provided "a sensible, although not necessarily compelling" rationale for its conclusions that all uses of the "F-Word" are depictions or descriptions of sexual activity and that even a single, fleeting use of that word was presumptively patently offensive. *Id.* at 49a.

INTRODUCTION AND SUMMARY OF ARGUMENT

For 30 years—literally as long as it had sought to police broadcast indecency—the Commission recognized that fleeting utterances of expletives generally fell outside its definition of indecent material. Most expletives, the Commission reasoned, did not depict or describe sexual or excretory activities, and in the rare instance in which the "F-Word" or the "S-Word" was used literally to describe sexual or excretory activity, the fleeting nature of the utterance usually—but not always—compelled a finding that it was not "patently offensive."

In the order under review, the Commission completed a reversal of course it initiated in 2004 and junked that longstanding enforcement policy. Henceforth, *any and every* use of the "F-Word" and the "S-Word" would be deemed to fall within the subject-matter scope of the Commission's indecency definition, and *all* such utterances would be treated as presumptively "patently offensive."

The Commission purported to accomplish this sea change in its indecency enforcement policy without altering in the slightest its definition of indecency. Rather than avowedly revise either the subject-matter scope of the indecency restriction, or the factors relevant to the analysis of "patent offensiveness," the Commission simply announced that the "core meaning" of certain expletives is always and everywhere the same, and adjusted downward to zero the weight it would accord to the second "principal factor" in the "patent offensiveness" analysis—"whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities." It was by these artifices that the Commission brought within its indecency definition speech that it had repeatedly held *not* indecent.

In the future, a fleeting expletive would avoid the Commission's sanction *only* if the Commissioners' *ad hoc* consideration of the expletive's "context" led them to conclude that the expletive had "artistic merit," or some other redeeming social value that made it not "patently offensive." In other words, whether an expletive is to be sanctioned as indecent would turn exclusively on the subjective value that the Commissioners placed on its *content*. Not surprisingly, this new enforcement rubric has produced capricious results that reflect more the Commission-

ers' individual tastes than any identifiable or judicially manageable standard of indecency.

I. The Commission's enforcement regime violates broadcasters' rights under the First Amendment. The Commission's definition of broadcast indecency—which purports to interpret and enforce a *criminal* statute, 18 U.S.C. § 1464—is virtually identical to the definition of indecency, found in the Communications Decency Act, that this Court struck down as unconstitutionally vague in *Reno*, 521 U.S. at 844. Indeed, the broadcasters' case for vagueness is even stronger than the pre-enforcement challenge in *Reno*: Where, in *Reno*, this Court invalidated the CDA's definition of indecency because it *invited* arbitrary enforcement and *threatened* to chill protected speech, here, broadcasters can point to four years' worth of *actual* arbitrary enforcement efforts that have *actually* chilled protected broadcast speech.

Moreover, the Commission's proscription of the broadcast of fleeting expletives is an invalid content-based restriction. The Commission asserts that broadcasting remains subject to intermediate scrutiny, but the decades-old rationales for diminished scrutiny—that over-the-air broadcasting is *unique* in its pervasiveness and accessibility to children, or that broadcast spectrum is scarce—were long ago overtaken by technological developments. Even under intermediate scrutiny, however, the restriction must fail: While the government may have a substantial interest in protecting children from pornography, and even the "verbal shock treatment" of *Pacifica*, this Court has never before held—and the Commission has not attempted to prove—that a fleeting utterance of an expletive poses a similar type of threat to the well-being of children. What is more, in view of the universal availability of targeted blocking technologies such as the V-chip, the Commis-

sion's indecency regime is not a permissible, targeted means for furthering that interest.

Lacking any persuasive response to the broadcasters' constitutional arguments—which were, at the Commission's insistence, pressed and passed upon below—the Commission asserts that the broadcasters cannot raise them in this Court because the broadcasters did not file a cross-petition raising constitutional questions. But the broadcasters do not seek to alter the Second Circuit's judgment; the court granted them all the relief their petition for review requested. More importantly, if the Commission's petition does not encompass those constitutional questions, then the petition raises only an alleged error in the application of clearly established administrative-law precedent—a question the petition itself repeatedly conceded did not warrant review. If the question the Commission presented to the Court is, in fact, not presented, this Court should dismiss the writ of certiorari as improvidently granted.

II. While this Court cannot reverse the judgment of the court of appeals, as the Commission urges, without departing from fundamental principles of First Amendment law, the Court can—and should—affirm the judgment below on the elementary ground found by the Second Circuit: The Commission proffered no reasonable explanation either for its change in view as to the "core meaning" of the "F-Word" and the "S-Word" or for its decision to accord effectively *no weight* to what *the Commission* says is a "principal factor" in analyzing whether a depiction or description of sexual or excretory activity is patently offensive. Indeed, in the order on review, the Commission denied—preposterously—that its indecency policy had changed at all. This is not the forthright grappling with agency precedent that the Administrative Procedure Act ("APA") requires.

ARGUMENT

I. THE REMAND ORDER VIOLATES THE FIRST AMENDMENT

As the prevailing parties in the court of appeals, respondents are entitled to defend the judgment of that court on any basis properly raised below. Before the Second Circuit, the broadcasters raised numerous arguments that the Remand Order violated their First Amendment rights, *see* Pet. App. 18a, and at least two of those arguments compel affirmance of the judgment below: First, the Commission's revised definition of indecency is unconstitutionally vague. Second, even if the Remand Order identifies with adequate precision the speech it proscribes, it is an invalid content-based restriction of broadcasters' speech.

A. The Broadcasters' First Amendment Arguments Are Properly Before This Court

The Commission contends that the Second Circuit's discussion of the broadcasters' constitutional challenges was merely "dicta," and that, because the broadcasters did not file a cross-petition to review those dicta, they "are precluded from raising their constitutional challenges in this Court." FCC Br. 42, 43. Like so much else in the Commission's indecency enforcement efforts, this amounts to a startling reversal of position. This Court should not countenance the Commission's latest bait-and-switch.

1. When the broadcasters first petitioned for review of the Omnibus Order, the Commission sought and obtained a voluntary remand specifically so that it could address the broadcasters' "constitutional and statutory challenges to the indecency findings." Mot. for Voluntary Remand at 4. After those challenges were "fully briefed" and argued, the Second Circuit

addressed those challenges on the merits in the "interest of judicial economy"—that is, to guide the Commission on remand—not as an interesting aside. Pet. App. 35a. Although the court of appeals "refrained" from a definitive ruling on the broadcasters' constitutional challenges, it nevertheless made clear its view that the Commission's indecency enforcement regime was "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague," *id.* at 36a, and otherwise inconsistent with the First Amendment's strict limitations on content-based restrictions of speech. *See id.* at 39a–43a.

Indeed, when it was seeking this Court's review, the Commission *conceded* that this case would not meet certiorari standards apart from the need to consider the Second Circuit's constitutional analysis, because—as the Commission *then* saw it—that analysis had "effectively nullifie[d] the prohibition on indecent language" (Pet. 29) rendering the remand for additional explanation illusory. *See also* Pet. 15 ("a remand to an agency for a fuller explanation of a policy would not merit this Court's review"). And consistent with that view, the Commission presented a question that was not limited to whether the Commission had provided an adequate explanation for its change in policy. *Id.* at I.

Now that it has *obtained* review, the Commission has changed its tune (again), insisting that this case turns only on "the application of well-settled principles of administrative law" and that this Court may not even consider respondents' constitutional arguments. FCC Br. 20. If the Commission's "question presented," in fact, is not presented, then the proper course is for this Court to dismiss the writ of certiorari as improvidently granted. *See Belcher v. Stengel*, 429 U.S. 118, 119 (1976) (per curiam) (dis-

missal appropriate when, after briefing, "it appears that the question framed in the petition for certiorari is not in fact presented by the record").

2. The Commission's contention that the absence of a cross-petition bars respondents from raising their First Amendment arguments in this Court also fails on its own terms.

a. "[A] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Forney v. Apfel*, 524 U.S. 266, 271 (1998) (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980)). Nor may prevailing parties appeal dicta that displeases them. *See Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 99 n.6 (1954). Accordingly, a prevailing party may cross-petition for certiorari only when it "seeks to alter the judgment below" with respect to an "issue on which it was a judgment *loser*." *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364, 365 (1994).

When a "party seeks to preserve, and not to change, the judgment," a prevailing party "need not cross-petition"; it may "defend [that] judgment on any ground properly raised below." *Nw. Airlines*, 510 U.S. at 364. Simply substituting one legal basis for a judgment below for another—affirming, for example, a judgment on constitutional, rather than statutory grounds—will not modify the judgment so as to require a cross-petition. *See Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) (rejecting "novel view" that an affirmance that "rests on a different legal basis than the court below adopted" somehow "'modifies' the judgment" so as to require a cross-petition).

b. The Commission contends that acceptance of the broadcasters' constitutional challenges would give them "broader relief," because it would change

the terms of the Second Circuit's remand—from one "aimed at" curing administrative-law deficiencies, to one "aimed at" curing constitutional defects—and thereby further constrain the Commission's regulatory options while expanding the broadcasters' range of permissible speech. FCC Br. 43. This argument fails for two reasons.

First, the fact that an alternative ground for a judgment may enlarge the respondent's options in subsequent proceedings does not alter the *judgment*. When the government was the respondent in *Jones v. United States*, 527 U.S. 373 (1999), it defended the judgment of the Fifth Circuit—which had found constitutional sentencing error, but held the error harmless—on the alternative ground that there was no constitutional error at all. *Id.* at 396–97 (plurality op.). Even though the government's alternative argument indisputably sought to enlarge the government's range of permissible conduct in subsequent proceedings, a plurality of this Court found that argument "properly presented" in the absence of a cross-petition because it did not expand the government's *relief* beyond that which had been awarded below—affirmance of the defendant's sentence. *Id.* Here, as in *Jones*, the court of appeals granted to respondents all the relief they had requested. *Compare* C.A. Jt. App. 2 (requesting that court "hold unlawful and set aside" the Remand Order) *with* Pet. App. 34a (granting the petition for review and vacating the Remand Order as "invalid") *with Forney*, 524 U.S. at 271 (holding that petitioner was aggrieved by order that had "give[n] petitioner some, but not all, of the relief she requested"). The adoption of an alternative ground that is in some sense more favor-

able to the respondent does not suffice to alter the *judgment* and require a cross-petition.[3]

Second, the Commission brought this case to the Court on the strength of its representation that the Second Circuit's opinion—particularly its lengthy discussion of the constitutional flaws in the Commission's new approach—did much more than simply remand the case so that the Commission could comply with this or that administrative-law nicety. The Commission complained bitterly that the Second Circuit's constitutional analysis—offered "in the interest of judicial economy," Pet. App. 35a—had "effectively invalidat[ed] much of the Commission's authority to enforce 18 U.S.C. 1464" and transformed the administrative-law remand into a "Sisyphean errand" the outcome of which was preordained. Pet. 15. On this view, a decision from this Court holding that the Commission's indecency determinations violated the First Amendment would not alter even the terms of the Second Circuit's remand as described to this Court *by the Commission itself*.

If, as this Court has stated, the central purpose of the cross-appeal requirement is to "put[] opposing parties and appellate courts on notice of the issues to be litigated and encouraging repose of those that are not," and thereby advance "the orderly functioning of the judicial system," *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 481–82 (1999), that purpose compels rejection of the Commission's effort to forestall the very review that it invited.

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[3] Indeed, because virtually all remands to agencies are "'for further proceedings in accordance with' the court's opinion," FCC Br. 43, if the Commission were correct, then a respondent could never (without filing a cross-petition) suggest an alternative basis for a vacatur of agency action because any such alternative defense inevitably would alter the terms of the remand.

B. The Indecency Definition Applied In The Remand Order Is Impermissibly Vague

Time and again, this Court has held that vague and indeterminate content-based restrictions on speech violate the First Amendment. *See, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991). Imprecise restrictions on the content of speech inevitably chill large amounts of protected speech by requiring speakers to "steer far wide[] of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). These concerns are especially acute when, as here, violations of the restrictions at issue may be punished criminally.[4]

The Commission's definition of "indecency" under 18 U.S.C. § 1464 cannot remotely meet constitutional standards, either facially or in its application. This Court's decision in *Reno*, 521 U.S. at 844, establishes that the Commission's definition of "broadcast indecency" is impermissibly vague on its face. It is also vague as applied: The Commission's befuddling enforcement policy has become even more indeterminate over time as the Commission has turned away from its precedents and increasingly (if not exclusively) toward the Commissioners' individual subjective evaluations of "artistic merit." Pet. App. 76a n.44, 120a n.191. With the Commission now threatening broadcasters with a fine of up to $325,000 *per licensee* for each violation of its indiscernible policy, the unconstitutional chill on broadcasters' speech is palpable.

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[4] Section 1464 is a criminal statute and, as such, it must be strictly construed, even in non-criminal cases, for "[t]here cannot be one interpretation for the Federal Communications Commission and another for the Department of Justice." *FCC v. ABC*, 347 U.S. 284, 296 (1954).

1. As the D.C. Circuit has recognized, "the [*Pacifica*] Court did not address, specifically, whether the FCC's definition [of indecency] was on its face unconstitutionally vague." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (Ginsburg, R.B., J.). *Reno*, however, compels the conclusion that it is.[5]

In *Reno*, this Court struck down as unconstitutionally vague an indecency standard in the Communications Decency Act ("CDA") that was materially *identical* to that employed by the Commission. The CDA proscribed as indecent "any . . . communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Reno*, 521 U.S. at 860 (quoting 47 U.S.C. § 223(d)(1)(B) (Supp. 1994)). That definition is virtually identical to the two-step definition employed by the Commission in this case: "First . . . the material must describe or depict sexual or excretory organs or activities. Second, the material must be patently offensive as measured by contemporary community standards." Pet. App. 71a–72a. The Commission's definition, like the CDA's, even emphasizes the importance of "context." *Id.* at 72a.

This Court found the CDA's indecency definition was plagued with "uncertainty" and full of terms

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[5] The notion, advanced by the Commission in the court of appeals, that respondents may not assert a vagueness challenge because Fox's broadcasts were "clearly proscribed," is spurious. *See* FCC C.A. Br. 68 (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). *Hoffman Estates* itself recognizes that its estoppel rule does not apply to "vagueness challenges" that "involve First Amendment freedoms." 455 U.S. at 495 n.7 (alteration omitted). Moreover, whether Fox's broadcasts are "proscribed" at all is the central issue in the case.

that lacked "any textual embellishment at all" or were barely explained. *Reno*, 521 U.S. at 871 & n.35. Concluding its indeterminacy would have had an "obvious chilling effect on free speech," the Court struck down the standard as "lack[ing] the precision that the First Amendment requires when a statute regulates the content of speech." *Id.* at 872, 874. The Commission complains that a "precise description of indecency . . . is unattainable," FCC C.A. Br. 71, but it otherwise has no persuasive answer to *Reno*.

Below, the Commission strained to distinguish *Reno* on the ground that it was an "Internet" case. FCC C.A. Br. 68. But that distinction makes no sense: There is no reason why the "medium" should matter in a *vagueness* inquiry. Either a standard provides sufficient notice and clarity to those bound to abide by it, or it does not. *Reno*'s evaluation (and invalidation) of what is, in fact, *the Commission's* indecency standard applies with equal force here, regardless of the fact that *Reno* is an "Internet" case and not a "broadcast" case.

The Commission also argued that the "administrative guidance" it has published—specifically, its explication of the three "principal factors" relevant to "patent offensiveness" (*Industry Guidance*, 16 F.C.C.R. at 8003 ¶¶ 9, 10)—"gives further content to [its] definition of indecency" and "ha[s] reduced any vagueness inherent" in its definition. FCC C.A. Br. 69, 70. But that is wrong for two reasons.

First, the Commission's guidance does not limit the subject-matter scope of the indecency definition—*i.e.*, the sexual or excretory organs or activities subject to the policy. In *Reno*, this Court concluded that a clear and discernible limitation on the subject-matter scope of the definition of indecency was

"critical" to "reduc[ing] the vagueness inherent in the open-ended term 'patently offensive.'" 521 U.S. at 873. The Court observed that the definition of obscenity in *Miller v. California*, 413 U.S. 15 (1973), included a "critical requirement" that the "proscribed material be specifically defined by the applicable state law." *Reno*, 521 U.S. at 873 (internal quotation marks omitted). That requirement—or any similar subject-matter limitation—was "omitted from the CDA," and it is missing from the Commission's definition as well. *Id.*

Second, under the Commission's standard as under the CDA, offensiveness is "measured by contemporary community standards." Pet. App. 72a. The Commission purports to intuit those standards from the mere fact that it exists and meets people—or as the Commission would have it, "constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens." *Id.* at 86a. But whether those standards are derived from the agency's (externally unknowable) Cartesian self-awareness, or, more likely, from a blizzard of "viewer complaints" that are computer-generated by a narrow ideological group determined to impose its own standards on the broader community, the question "whether material is 'patently offensive' according to community standards . . . [is] essentially one[] of *fact*." *Reno*, 521 U.S. at 873–74. In *Reno*, this Court concluded that the CDA's exclusive reliance on that *factual* inquiry precluded "appellate courts [from] impos[ing] some limitations and regularity on the definition . . . *as a matter of law*" and thus placed no effective limit on the indecency definition's "uncertain sweep." *Id.* at 873 (emphasis added). The Commission's definition suffers from the same fatal flaw, presenting the same grave "threat of censoring speech that, in fact, falls outside [its] scope," and

"silenc[ing] some speakers whose messages would be entitled to constitutional protection." *Id.* at 874.

2. Vague on its face, the Commission's indecency standard is even less determinate in application. Problems emerge first in the Commission's mechanism for selecting the broadcasts it will investigate. As the Commission itself has explained, it "does not independently monitor broadcasts for indecent material." *Industry Guidance*, 16 F.C.C.R. at 8015 ¶ 24. It instead relies exclusively upon "complaints of indecent broadcasting received from the public." *Id.* And the Commission has persisted stubbornly in its reliance on these so-called "viewer complaints" even though an irrefutable body of evidence demonstrates that the vast majority of these "complaints" are computer-generated by advocacy groups such as the Parents Television Council and forwarded by individuals who never viewed the broadcast alleged to be indecent. *See, e.g.*, Pet. App. 129a–130a & nn. 217–23.

This Court has "found governmental grants of power to private actors constitutionally problematic" when "the regulations allowed a single, private actor to unilaterally silence a speaker even as to willing listeners." *Hill v. Colorado*, 530 U.S. 703, 734 n.43 (2000). That is precisely what the Commission's enforcement policy accomplishes here. The indeterminate definition of "indecency," coupled with abdication of enforcement to advocacy groups, confers "broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech." *Reno*, 521 U.S. at 880. Moreover, the Commission, when determining whether material is patently offensive, relies on its effect on the audience, according weight to the "strong feelings" that "complainants . . . express[]." Pet. App. 77a. That obviously compounds the heckler's veto problem created by the Commis-

sion's delegation of its enforcement authority to activists. *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) ("Speech cannot be . . . punished or banned . . . simply because it might offend a hostile mob"); *see also Ashcroft v. ACLU*, 542 U.S. 656, 674 (2004) (Stevens, J., concurring) ("the Government may not penalize speakers for making available to the general . . . audience that which the least tolerant communities in America deem unfit for their children's consumption").

The bizarre and irreconcilable outcomes produced by this complaint-driven enforcement policy only amplify the inherent vagueness of the Commission's indecency standard. *Reno*, 521 U.S. at 870. When dozens of expletives—"fuck" and "'shit' and [their] variations"—were sprinkled through a three-and-a-half hour broadcast of *Saving Private Ryan*, the Commission concluded that the expletives were "neither gratuitous nor in any way intended or used to pander, titillate or shock," but instead portrayed "power, realism and immediacy" and were "[e]ssential to the ability of the filmmaker to convey" the "horrors of war," and thus were not patently offensive. *In re Complaints Against Various Television Licensees Regarding Their Broad. of "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512–13 ¶¶ 13, 14 (2005). But when the identical words were uttered by blues musicians in a Martin Scorsese-produced PBS documentary about the blues, the Commission tersely rejected the argument that the "vulgar, explicit, graphic, . . . and shocking" language was "essential," holding that the *Saving Private Ryan* exception would operate only in unelaborated "unusual circumstances" that were somehow "not present here." Jt. App. 75 ¶ 82. Yet, if those very same expletives were uttered by "a wire-tapped organized-crime figure on a news program," the "unusual circum-

stances" apparently would resurface and the expletives would revert to a non-patently-offensive character. FCC Br. 18.

The Commission's flip-flopping is not limited simply to expletives: When a broadcast of *NYPD Blue* contained brief glimpses of a female actor's naked buttocks, the Commission found it "shocking" and patently offensive. *See In re Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue,"* 23 F.C.C.R. 3147, 3154 ¶ 16 (2008). But when a broadcast of the film *Schindler's List* included a depiction of *full frontal nudity*, the scene was "disturbing," (*id.* at 3154 ¶ 17) but not "shocking," and thus not "patently offensive." *WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1841 ¶ 9 (2000).

The Commission cannot reconcile these outcomes by invoking its allegiance to "context," because the *Remand Order* itself makes clear that the Commission cannot make up its *own* mind about the *contexts* that will transform a fleeting expletive into patently offensive indecent material. In the Remand Order, the Commission concluded that the broadcast of the word "bullshitter" was not indecent because it occurred in the context of a "news interview." Pet. App. 128a. But just months earlier, the Commission had found the identical broadcast to be "shocking and gratuitous" and thus patently offensive *precisely because* it occurred in the context of a "news interview." Jt. App. 107. The Commission's invocation of "context" does not cure the vagueness of the Commission's standard.

Though the Commission "emphatically" denies it, Pet. App. 86a, it seems clear that the Commission's findings of patent offensiveness turn more on the individual Commissioners' particular *tastes*—their

evaluations of the "artistic merit" or "necess[ity]" of the material alleged by activist groups to be indecent, *id.* at 76a n.44, 120a n.191—than on any objective or verifiable analysis of whether the material "panders to, titillates or shocks the audience." *Id.* at 72a. Steven Spielberg evidently appeals to a majority of the current Commissioners; Martin Scorsese does not. But, as this Court has recognized, such an approach to content regulation is antithetical to the First Amendment: "[E]sthetic and moral judgments about art and literature" are "for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). And it is precisely this type of arbitrary and "discriminatory enforcement," *Reno*, 521 U.S. at 872, based on "wholly subjective judgments," *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008), that the vagueness doctrine seeks to curtail.

Under the Commission's indecency regime—where an "F-Word" uttered by a blues musician is indecent, and the same "F-Word" uttered by a soldier or gangster is not, where a glimpse of bare buttocks is indecent, but full frontal nudity is not, and where an "S-Word" uttered in the course of an interview of a reality-show contestant is indecent one day and not the next—it is impossible for broadcasters to reliably predict what the Commission will find indecent and what it will not. Broadcasters cannot possibly preordain whether individual Commissioners will protect a program's message as a "matter of public importance," or impose sanctions because its content was "communicative" but not "essential," Jt. App. 84; nor have they the powers of clairvoyance necessary to determine whether the Commission will faithfully apply its precedent or limit that precedent to unspecified "unusual circumstances." It is not merely

that, under the Commission's indecency standard, it is "difficult to determine whether the incriminating fact it establishes has been proved"; rather, it suffers from a fatal "indeterminacy of precisely what that fact is." *Williams*, 128 S. Ct. at 1846. And that indeterminacy renders the Commission's standard impermissibly vague.

3. There can be no doubt that the Commission's unfathomable enforcement regime chills broadcasters' protected speech. Indeed, in the court of appeals, the Commission did not deny the fact, arguing only that it does not do so "unduly." FCC C.A. Br. 75. But whether it does so "unduly" is for this Court—not the Commission—to determine. Thirty years ago, Justices of this Court found no likelihood of an "undue 'chilling' effect" on broadcasters' speech principally because the Commission promised that it would "proceed cautiously" in policing indecency—as exemplified by the "verbal shock treatment" that, by the narrowest of margins, had been sanctioned in that case. *Pacifica*, 438 U.S. at 762 n.4 (Powell, J., concurring). But the Commission now has abandoned any pretense of a "cautious[]" enforcement regime, and as it has done so, the chill on broadcasters' speech has deepened.

Perhaps the most dramatic display of this chilling effect involves *Saving Private Ryan*—material that the Commission has specifically held *not* indecent. On Veterans' Day 2004, dozens of ABC affiliates refused to air the network's unedited broadcast of that film, even though the network had shown the same film in 2001 and 2002. John Eggerton & Allison Romano, *Pre-Empting Private Ryan*, BROAD. & CABLE (Nov. 10, 2004). Similarly, in September 2006, many CBS affiliates delayed or elected not to broadcast the Peabody Award-winning documentary *9/11* because

of concerns over language used by firefighters, even when the program had "aired twice without controversy" on the network in 2002—before the Commission's about-face in *Golden Globe II*. Larry Neumeister, *Some CBS Affiliates Worry over 9/11 Show*, ASSOCIATED PRESS (Sept. 3, 2006) (noting an activist group's effort to "read[y] its 3 million members to flood the FCC and CBS with complaints").

The chill cast by the Commission's regulation of fleeting expletives is particularly invidious for live programming—be it news, sports, or entertainment. For respondents, this is not merely a matter of conjecture: The Commission has pending several investigations concerning NBC broadcasts of expletives during live sporting events. For example, after nearly four years, the Commission still has yet to close its investigation of NBC's live broadcast of the USA-versus-China women's volleyball game in the 2004 Summer Olympic Games from Athens, Greece, for an American player's supposed utterance of the "F-Word" (picked up by a courtside microphone) after misplaying a ball when the U.S. team was trailing, 21–20, in a crucial game. *See* C.A. Jt. App. 271. The Commission initiated an inquiry notwithstanding the fact that exactly *none* of the 41.34 million of that day's actual Olympics viewers lodged a complaint about that utterance. *Id.* at 278–79.[6]

To be sure, this and other "letters of inquiry" do not constitute final agency action. Now that we are on the eve of the *2008* Summer Olympics, the Commission, after more than three years of "careful re-

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[6] *See also* C.A. Jt. App. 222 (response to FCC letter of inquiry concerning NBC's 2004 live broadcast of an interview of a college football player who, after leading his team to a come-from-behind victory over heavily favored Notre Dame, said, "I'm so fucking proud of this football team").

view," ultimately may take no action against NBC for these broadcasts. But neither are they irrelevant to the legal issue before this Court, even if the Commission *ultimately* takes no action: Insofar as these "letters of inquiry" arrive with the threat of fines of up to $325,000 per utterance per licensee, *see* 47 U.S.C. § 503(b)(2)(C)(ii), and the implicit threat of criminal prosecution, even the initiation of an *investigation* is sufficient to cause broadcasters to restrict their expression "to that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). And if well-meaning, well-intentioned people in the broadcast industry simply cannot ascertain whether *Saving Private Ryan*, a 9/11 documentary, a blues documentary, or even the Olympic Games are "unquestionably safe," the chilling effect generated by that indeterminacy is, under any conceivable measure worthy of our society, undue.[7]

C. The Remand Order Fails Any Standard Of Scrutiny Appropriate To Restrictions Of Broadcast Content

This Court generally applies "the most exacting scrutiny" to content-based restrictions on speech, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994), presuming any such restriction to be invalid

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[7] Citing this Court's decision in *Alexander v. United States*, 509 U.S. 544, 555–58 (1993), the Commission below dismissed the chilling effect posed by its fines, arguing that "nothing in the Constitution precludes the government from imposing penalties that are sufficient to deter violations of law, even where expression is concerned." FCC C.A. Br. 78. If this were true, then no chilling effect on expressive activity—no matter how great—would violate speakers' First Amendment rights. That, of course, is not the law, *see, e.g.*, *Reno*, 521 U.S. at 872, and *Alexander*, which involved only penalties for marketing unprotected *obscene* materials, does not stand for so extreme a proposition.

and requiring that the government prove that the restriction is the least restrictive means to achieve a compelling state interest. This standard applies to content restrictions of cable and satellite television, *see Playboy*, 529 U.S. at 813, the Internet, *see Reno*, 521 U.S. at 874, and communications by telephone, *see Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989), not to mention outdoor movie theaters, *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 (1975), and newspapers, *see Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

The Commission, however, contends that over-the-air broadcasting—alone among all modern channels of communication—is entitled only to "the most limited First Amendment protection." FCC C.A. Br. 57. Invoking this Court's decisions in *Pacifica* and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Commission asserts that restrictions on broadcast content need only be "narrowly tailored" to some "substantial" governmental interest. FCC C.A. Br. 58 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984)). Decades have passed, though, since this Court decided *Pacifica* and *Red Lion*, and technologies achieved in the intervening years have completely eroded the empirical underpinnings of those decisions and, with them, any sound basis for continuing to apply a "more relaxed standard of scrutiny" to restrictions on broadcast content. *Turner*, 512 U.S. at 639.

But whether "exacting" or "relaxed" scrutiny applies to the Remand Order, it cannot survive. Under either standard, "the Government bears the burden of proving" both the weight of its asserted interest and that its content restriction is adequately tailored to that interest in view of available less restrictive alternatives. *Playboy*, 529 U.S. at 816; *see also*

Ashcroft, 542 U.S. at 665. It can do neither here. This Court has never held that an isolated utterance of an expletive is the type of material that warrants direct government regulation. All that is vulgar is not indecent. Indeed, "one man's vulgarity" may be "another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). In any event, in view of the universal availability of parental controls such as the V-chip, the Commission's direct proscription of such speech—shutting a broadcaster's speech off at its source—is not remotely "narrowly tailored" to its asserted interest.

1. There Is No Longer A Sound Basis For According Relaxed Scrutiny To Content-Based Restrictions Of Broadcast Speech

To justify the application of a diminished scrutiny to its content restriction, the Commission points to physical attributes supposedly "unique" to the broadcast medium. FCC C.A. Br. 58. Quoting this Court's 1978 decision in *Pacifica*, the Commission argues that the broadcast medium has "established a uniquely pervasive presence," and is "uniquely accessible to children." *Id.* at 57 (quoting 438 U.S. at 748, 749). And invoking *Red Lion*'s much-criticized "scarcity rationale," the Commission also posits that the broadcast medium is unique in that "there are substantially more individuals who want to broadcast than there are frequencies to allocate." *Id.* at 58 (quoting 395 U.S. at 388). Whatever validity these rationales may have had when this Court articulated them decades ago, they rest today on moth-eaten foundations and can no longer support the "relaxed" scrutiny on which the Commission's content restrictions have historically depended.

1. Thirty years after *Pacifica*, it can no longer be said that, of all channels of communication, broadcasting is "*uniquely* pervasive" or "*uniquely* accessible to children." 438 U.S. at 748, 749 (emphases added). Already 12 years ago, a four-Justice plurality of this Court concluded that cable television was as "pervasive" and "as 'accessible to children' as over-the-air broadcasting, if not more so." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 744, 745 (1996) (plurality op.) ("*DAETC*").[8]

In the 12 years since *DAETC*, over-the-air broadcasting has become ever less "uniquely pervasive." The Remand Order itself acknowledges that, in 2005, *86 percent* of television households subscribed to cable or satellite service.[9] Pet. App. 106a–107a. Meanwhile, the Internet has also assumed a central role in the delivery of content to American homes. The Commission recently reported that (as of June 2007) more than 99 percent of households had access

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[8] Indeed, if one includes the three Justices who rejected the historical "distinctions between media" as "dubious from their infancy," *DAETC*, 518 U.S. at 813 (Thomas, J., concurring in the judgment in part, dissenting in part), not just four, but *seven* Justices disapproved treating over-the-air broadcasting differently from cable and satellite broadcasting.

[9] The Commission's data dates to 2005 and is set forth in its *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C.R. 2503 (2006). Perhaps coincidentally, perhaps not, the Commission has failed to issue any subsequent assessment of competition in the video marketplace since the broadcasters filed their petitions for review, notwithstanding a statutory mandate that it make such reports to Congress "*annually*." 47 U.S.C. § 548(g) (emphasis added). Analyzing May 2008 data, Neilsen Media Research found that 89.5 percent of television households subscribed to cable or satellite service. *See* Katy Bachman, Satellite TV Continues to Bite into Wired Cable, *MediaWeek* (June 11, 2008).

to high-speed Internet service, and that more than *65.9 million* households actually used high-speed Internet service.[10] As Commission staff has put it, "what is pervasive today is hundreds of channels and billions of web pages," and "the invasion leaves most American households not anxious, but indifferent." John W. Berresford, Federal Communications Commission, Media Bureau Staff Research Paper: The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed 29 (2005).

Still, the Commission observes that, even if nine-tenths of all households receive their television service from a cable or satellite provider, "that still leaves millions of households that rely exclusively on over-the-air broadcasting." FCC C.A. Br. 59. (The Commission assumes, apparently, that households that do not subscribe to cable or satellite television service also lack access to the Internet.) But the Commission overlooks the fact that *only one-third* of American households include children under 18.[11] If only 14 percent of all households rely solely on broadcast television for real-time programming, and only one-third of those households will include children under 18, that means the Commission's content regulation thus remains relevant to, at the very most, *five percent* of American households. The Commission thus is reduced to claiming that broadcasting is "uniquely pervasive" because this small percentage of Americans is "hardly . . . inconsequen-

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10 *See* Federal Communications Commission, *High-Speed Services for Internet Access: Status as of June 30, 2007*, at 3, 4 (Mar. 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf (last visited July 31, 2008).

11 *See* U.S. Census Bureau, *Selected Social Characteristics in the United States: 2006*, available at http://factfinder.census.gov (last visited July 31, 2008).

tial." Pet. App. 107a. Broadcast television, like other content in our media-driven age, may be "pervasive," but in 2008, even the Commission has trouble contending that it is "*uniquely*" so.

The nearly 30 years since *Pacifica* have similarly eviscerated the notion that broadcast television is "uniquely accessible to children" when compared to other media. 438 U.S. at 749. Indeed, the availability of alternative media sources is even more pronounced with respect to younger generations than with adults. According to a 2005 report cited by the Commission, *see* Pet. App. 107a–108a & n.154, households with children today are "media saturated." Donald F. Roberts et al., *Generation M: Media in the Lives of 8–18 Year-Olds* 10 (Kaiser Family Found. 2005). Like all media content, broadcast programming is accessible by children to some degree, but certainly it is no longer *uniquely* available when compared to the countless other avenues—cable, satellite, the Internet, mobile phones, iPods, iPhones, the list goes on—through which children up to age 18 receive video and audio content.

Against this background of profound technological change in how people obtain and communicate information in the 21st Century, the Commission's insistence that "*Pacifica*'s premises remain as valid today as they were in 1978," FCC C.A. Br. 61, is simply absurd. The technological and cultural developments of the last 30 years must be accorded doctrinal significance.

2. In its court-of-appeals brief (but not in the *Remand Order* itself) the Commission also relied on the much-criticized "scarcity rationale" to support its continued censorship of the broadcasting medium. *See* FCC C.A. Br. 58 (citing *Red Lion*, 395 U.S. at 388); *see also NBC v. United States*, 319 U.S. 190,

213 (1943) ("the radio spectrum simply is not large enough to accommodate everybody"). The Commission's hasty exhumation of the scarcity rationale represents yet another startling reversal of position. More than 20 years ago, the Commission had buried the doctrine, stating, "we no longer believe that there is scarcity in the number of broadcast outlets available to the public," and that accordingly "the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press." *In re Complaint of Syracuse Peace Council Against Television Station WTVH*, 2 F.C.C.R. 5043, 5053, 5054 ¶¶ 65, 74 (1987); *see also General Fairness Obligations of Licensees*, 102 F.C.C.2d 145, 196–211 ¶¶ 81–131 (1985).[12]

That the Commission would bother with the backflip at all is puzzling because *Red Lion* itself recognizes that the scarcity rationale supported only making room for *additional* speech deemed to be in the public interest—not "government *censorship* of a particular program" or other restrictions on the broadcaster's ability to "carry a particular program or to publish his own views." 395 U.S. at 396 (emphasis added); *see also FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 379 n.12 (1984) (if scarcity doc-

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12 To be sure, the Commission later repudiated its repudiation of the scarcity rationale, calling its earlier decision "dicta." *In re Repeal of Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C.R. 19,973, 19,979 ¶ 17 (2000). Even if the Commission's legal conclusion that a unitary standard of scrutiny should apply to print and broadcast media were dictum—which is plainly not the case, *see Syracuse Peace Council*, 2 F.C.C.R. at 5043 ¶ 1—the Commission could not unwind its *factual finding* that there was, in 1987, no "scarcity in the number of broadcast outlets available to the public." *Id.* at 5054 ¶ 74; *see also id.* at 5051 ¶ 55.

trine had "'the net effect of reducing rather than enhancing' speech, we would then be forced to reconsider the constitutional basis" for the doctrine (quoting *Red Lion*, 395 U.S. at 393)); *Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., dissenting). Once upon a time, the Commission recognized this limitation on the scarcity rationale as well. *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 11 (1987) ("we no longer consider . . . spectrum scarcity to provide a sufficient basis for [indecency] regulation").

While this Court has not yet found occasion to disavow the rationale, *see Turner*, 512 U.S. at 638 ("we . . . see no reason to do so here"), it has long expressed openness to doing so upon an appropriate showing of changed circumstances. *See CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973) ("the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence"); *League of Women Voters*, 468 U.S. at 377 n.11 (inviting the Commission to send "some signal . . . that technological developments have advanced so far" as to render the scarcity rationale "obsolete").

Whatever its validity when *Red Lion* affirmed it in 1969, or in 1987 when the Commission rejected it without reservation, today the scarcity rationale is totally, surely, and finally defunct. The fact is that, today, "spectrum" is not "scarce." When *Red Lion* was decided in 1969, there were 7411 over-the-air broadcasting stations in the United States. *See* Berresford, *supra*, at 13. In 1987, when the Commission rejected the scarcity rationale as empirically unsupported, there were 10,128. *See Syracuse Peace Council*, 2 F.C.C.R. at 5053 ¶ 67. Today, there are

15,736.[13] Moreover, this explosion of traditional broadcast outlets has been accompanied, recently, by an explosion of new broadcast technologies—satellite television, satellite radio, HD radio, and low power FM, to name a few of the many. And as the Nation transitions from traditional analog broadcasting to digital broadcasting—most analog television broadcasts must cease by February 17, 2009, *see* 47 U.S.C. § 309(j)(14)(A)—broadcasting opportunities are set to redouble once again: Digital broadcasts are "more resistant to interference than analog broadcasts," allowing the Commission to "stack broadcast channels right beside one another along the spectrum," and digital broadcasting moreover allows broadcasters to "multicast"—to deliver as many as six channels of content in their allocated channel of spectrum. *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 293, 294 (D.C. Cir. 2003) (Roberts, J.).

The antiquated notion of spectrum scarcity can no longer serve as a basis for according only "relaxed scrutiny" to content restrictions in the broadcast media. Nor can the outmoded premises of *Pacifica*—that over-the-air broadcasting is "uniquely pervasive" or "uniquely accessible to children." As with any other content-based restriction of speech, the government should be made to demonstrate that the Remand Order serves a compelling state interest and is the least restrictive means available to achieve that interest. It cannot do either.

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13 Federal Communications Commission, News Release: Broadcast Station Totals as of December 31, 2007 (Mar. 18, 2008), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-280836A1.pdf (last visited July 31, 2008).

2. Isolated Expletives Are Not Constitutionally Indecent Speech

The Commission has pitched much of its approach after *Golden Globe II* on the mere Humpty-Dumpty-worthy *assertion* that the "S-Word" and the "F-Word" always and universally have excretory and sexual meanings, respectively. *Cf. TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978) ("'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what *I* choose it to mean—neither more nor less'" (quoting Through the Looking Glass, in The Complete Works of Lewis Carroll 196 (1939))). But for the Commission to say that a particular word or image falls within its definition of indecency—or for that matter, Congress's—does not itself resolve the question whether that word or image is indecent in the constitutional sense. If the Commission tomorrow declared that the word "armoire" is indecent, that could not itself demonstrate that the government has a compelling state interest in shielding children from exposure to that word. The constitutional category of indecent speech includes only those words or images that have actual capacity to threaten "the physical and psychological well-being of minors," *Sable Commc'ns*, 492 U.S. at 126, and the Commission may not—by mere *ipse dixit*—conclude which words have such an impact.

This Court has tightly limited the constitutional category of indecent speech to patently offensive depictions or descriptions of sexual activity or organs, such as pornographic "'girlie' magazines," *Ginsberg v. New York*, 390 U.S. 629, 631 (1968); "sexually explicit adult programming" that "many adults . . . would find . . . highly offensive," *Playboy*, 529 U.S. at 811; and "pictures of oral sex, bestiality, and rape"—"material that would be offensive enough [to be obscene] *but for* the fact that the material also has 'se-

rious literary, artistic, political or scientific value' or nonprurient purposes." *DAETC*, 518 U.S. at 752 (plurality op.).

On the other hand, this Court has rejected the proposition that *all* displays of nudity are harmful to children and therefore subject to regulation. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (invalidating ordinance that barred exhibition of films containing nudity at outdoor movie theaters). Unless limited to "sexually explicit nudity," the Court held, a ban on displays of nudity could not "be justified by any . . . governmental interest pertaining to minors." *Id.* And, critically for this case, a plurality of the Court (at least) also has rejected the proposition that the government's compelling interest in shielding children from patently offensive sex-related materials extends to "an occasional expletive." *DAETC*, 518 U.S. at 752 (plurality op.) (quoting *Pacifica*, 438 U.S. at 750). Indeed, *Pacifica* itself expressly reserved the question whether "an occasional expletive" could be proscribed as indecent. 438 U.S. at 750.

The 12-minute "Filthy Words" monologue at issue in *Pacifica* was miles away from an "occasional expletive." It contained *100* separate utterances of the "F-Word" or the "S-Word" (an average of one every seven seconds), *see* 438 U.S. at 751–55 (appendix), and, crucially, the broadcaster there "d[id] not dispute" that several of the expletives explicitly "referred to excretory or sexual activities or organs." *Id.* at 739. Nor did the broadcaster "quarrel with the conclusion that this afternoon broadcast was patently offensive." *Id.* Its defense "rest[ed] entirely on the absence of prurient appeal" in the material. *Id.* The broadcaster thus *conceded* that it had broadcast patently offensive depictions of sex. In providing the

decisive fourth and fifth votes to reject the broadcaster's First Amendment challenge, Justices Powell and Blackmun stressed that "the Court's holding . . . does not speak to cases involving the isolated use of a potentially offensive word . . . as distinguished from the verbal shock treatment administered by [Pacifica] here." *Id.* at 760–61 (Powell, J., concurring).

If *Pacifica* did not address whether an "occasional expletive" or the "isolated use of a potentially offensive word" could be regulated as uniquely dangerous to children, *Cohen v. California*, 403 U.S. 15 (1971) and its progeny suggest strongly that it cannot. In *Cohen*, this Court reversed Cohen's conviction for engaging in "offensive conduct" based upon his public display, in a courthouse, of a jacket emblazoned with the words "Fuck the Draft." *Id.* at 16. And similarly, in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), this Court summarily vacated in light of *Cohen* Rosenfeld's conviction of "utter[ing] . . . indecent language in a[] . . . public place," specifically, his utterance of "the adjective '[m]----- f-----' on four different occasions" while speaking at a school board meeting. *Id.* at 910 (Rehnquist, J., dissenting). In the manner used on Cohen's jacket, the Court observed, the "F-Word" was devoid of sexual meaning; it could not "plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted." 403 U.S. at 20.[14] The Court thus rejected

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14 Rosenfeld's remarks were similarly devoid of sexual content. "Testimony varied as to what particular nouns were joined with this adjective, but they were said to include teachers, the community, the school system, the school board, the country, the county, and the town." 408 U.S. at 910 (Rehnquist, J., dissenting).

state efforts to "punish[] public utterance of this unseemly expletive in order to maintain what [it] regard[s] as a suitable level of discourse within the body politic." *Id.* at 23. "[G]overnmental officials," the Court wrote, "cannot make principled distinctions in this area." *Id.* at 25.

If, however, there existed a well-established compelling state interest in shielding children from exposure to a "single four-letter expletive," *Cohen*, 403 U.S. at 26—if, as the Commission contends, even isolated expletives "pose to children" risks of harm similar in magnitude to that posed by the pornographic images in *Ginsberg*, the dial-a-porn messages in *Sable*, and the verbal shock treatment in *Pacifica*, FCC Br. 19—then both *Cohen* and *Rosenfeld* would have been decided differently because, in both instances, *the speaker actually exposed children to the expletives*. *See Cohen*, 403 U.S. at 16 ("There were women and children present in the corridor"); *Rosenfeld*, 408 U.S. at 910 (Rehnquist, J., dissenting) ("there were approximately 40 children and 25 women present at the meeting"). If the Commission wishes to expand the category of constitutionally indecent material to sweep in not just patently offensive pornographic materials historically subject to government regulation, but now even isolated utterances of expletives like that at issue in *Cohen*, it is the Commission's burden to "demonstrate that the recited harms are real, not merely conjectural," *Turner*, 512 U.S. at 664, and that they are sufficiently grave as to make the government's alleviation of them a compelling governmental objective. *See Playboy*, 529 U.S. at 819–21; *see also DAETC*, 518 U.S. at 766 (plurality op.) ("In the absence of a factual basis substantiating the harm . . . we cannot assume that the harm exists"). Yet, as the Second Circuit observed, the Remand Order is "devoid of any

evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation," Pet. App. 32a, and the Commission does not dispute that conclusion here.[15]

3. The Commission Has Failed To Demonstrate That Targeted Blocking Of Indecent Broadcasts Cannot Achieve The Commission's Asserted Goal Of Protecting Children From Indecent Material

"[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Playboy*, 529 U.S. at 814. Where "a less restrictive means is available for the Government to achieve its goals, the Government *must* use it." *Id.* at 815 (emphasis added). "[T]argeted blocking" of illicit speech "is less restrictive than banning," and, accordingly, "the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." *Id.*

The "V-chip," since 2000 included by statutory mandate in every television larger than 13 inches (*see* 47 U.S.C. § 303(x)), allows parents to review program ratings and to block, in a targeted manner, the broadcast content they deem inappropriate for their

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15 The Commission answers that its "duty is to enforce the statute that Congress enacted, not to second-guess the evidentiary basis for its enactment." FCC Br. 19. But 18 U.S.C. § 1464, which, as a criminal statute, "is not administered by any agency but by the courts," *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring), does not answer whether isolated expletives are actually "indecent" much less whether Congress could constitutionally make them so.

children. *See DAETC*, 518 U.S. at 756 ("manufacturers, in the future, will have to make television sets with a so-called 'V-chip'—a device that will be able automatically to identify and block sexually explicit or violent programs"). To enhance parental authority over their children's broadcast television consumption, the FCC joined with the broadcast and cable industries to develop a user-friendly rating system that identifies, in a manner that both parents and the V-chip can understand, "video programming that contains sexual . . . or other indecent material." *In re Implementation of Section 551 of the Telecommunications Act of 1996*, 13 F.C.C.R. 8232, 8232 (1998). To block unwanted content, a parent need only program her television's V-chip to block signals bearing the program ratings she deems inappropriate for her children's viewing.[16]

The broadcasters having proffered, in the V-chip and program ratings, a method of targeted blocking that is less restrictive than direct regulation, "the burden is on the Government to prove that the proposed alternatives will not be as effective as [direct regulation]." *Ashcroft*, 542 U.S. at 665. The Commission allows that "[t]he V-chip provides parents with some ability to control their children's access to broadcast programming," Pet. App. 109a, but claims to have "identified several serious limitations on the effectiveness of the V-chip." FCC C.A. Br. 73. Its contentions, however, cannot bear the government's "constitutional burden of pro[ving]" that "speech is

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16 *See* FCC, News Release: Commission Finds Industry Video Programming Ratings System Acceptable; Adopts Technical Requirements to Enable Blocking of Video Programming (Mar. 12, 1998) available at http://www.fcc.gov/Bureaus/Cable/News_Releases/1998/nrcb8003.html (last visited July 31, 2008).

restricted no further than necessary to achieve [its] goal." *Ashcroft*, 542 U.S. at 660, 666.

First, the Commission argued that "most televisions do not contain a V-chip, and most parents . . . do not know how to use," or are otherwise unwilling to use, the V-chip. Pet. App. 109a. That statement, which was supported principally by a *2003* study which itself relied on data—specifically, a small survey of 150 Philadelphia families—collected in *2000* (the year Congress's V-chip mandate became effective), certainly was erroneous at the time the Commission made it in November *2006*.[17] But even if it were true—and it is not—it could not demonstrate that the V-chip is an ineffective alternative to direct suppression of speech. This Court rejected a substantially identical "list of practical difficulties" in *DAETC*, and concluded that the difficulties called "not for [direct regulation], but, rather, for informational requirements." 518 U.S. at 759 (majority op.). And in *Ashcroft*, this Court held the *commercial*

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[17] *Compare* Pet. App. 109a n.159 (citing Annenberg Public Policy Center, *Parents Use of the V-Chip to Supervise Children's Television Use* 3 (2003)) *with* NBC C.A. Br. 61, 62 (citing *2007* data demonstrating that approximately 70 percent of the 285 million televisions then in use contained a V-chip and a 2004 survey revealing that 89 percent of parents who had used the V-chip found it "somewhat useful" or "very useful"). Moreover, just months from now, when analog television broadcasts are scheduled to end, *virtually every television capable of receiving over-the-air broadcasts will be equipped with a V-chip*. To receive digital broadcasts, a consumer needs either a television that includes a digital tuner or a set-top digital-to-analog converter box. Because digital tuner technology did not become widely available until after 2000, *see Consumer Elecs. Ass'n*, 347 F.3d at 294, virtually all digital tuner-equipped televisions, by law, contain a V-chip. *See* 47 U.S.C. § 303(x). And, by law, so do all government-subsidized set-top digital-to-analog converters. *See* 47 C.F.R. §§ 301.1–301.2, 301.5(d).

availability of filtering software, in conjunction with the possibility that Congress could "enact[] programs to promote [its] use," to be an effective alternative to direct suppression. 542 U.S. at 670. The fact that "Congress may not require [a voluntary blocking mechanism] to be *used*" "carries little weight." *Id.* at 669 (emphasis added). "[T]hat voluntary blocking requires a consumer to take action, or may be inconvenient," does not make a less restrictive alternative *ineffective*. *Playboy*, 529 U.S. at 824. The government may not directly regulate the content of speech on the basis of a "presum[ption]" that "parents, given full information, will fail to act." *Id.*

Second, the Commission argued that because the V-chip system "depends on the accuracy of program ratings," it remains possible that a viewer could be exposed to content she intended to block if a program's "rating does not reflect the material that is broadcast." Pet. App. 109a. But this Court has held that the fact that a voluntary blocking system "may not go perfectly every time" does not disqualify it. *Playboy*, 529 U.S. at 824. Indeed, in *Playboy*, the Court acknowledged that there was "little doubt" that the existing voluntary blocking regime left open the possibility that "some children will be exposed" because of delays in the administration of blocking requests by "unresponsive operators." *Id.* at 824, 826. The government's burden, however, was to demonstrate that not even a "*hypothetical*, enhanced version" of the voluntary blocking regime—one that gave "operators ample incentive, through fines or other penalties for noncompliance, to respond to blocking requests in prompt and efficient fashion"—could be effective to accomplish the government's aims. *Id.* at 823, 824 (emphasis added). Here, the Commission failed to demonstrate even that the *current* V-chip system is ineffective at empowering

parents to block indecent content from their children; and it did not address, much less prove the ineffectiveness of, "hypothetical, enhanced" V-chip systems.

The Commission's failure of proof is unsurprising: *Congress itself concluded that the V-chip and program ratings would be effective*, finding that "[p]roviding parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling government interest." Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(a)(9), 110 Stat. 140. President Clinton endorsed this finding, predicting that the V-chip will "empower families to choose the kind of programming suitable for their children." Statement by President William J. Clinton Upon Signing the Telecommunications Act of 1996, 1996 U.S.C.C.A.N. 228-1, 228-3 (Feb. 8, 1996). Indeed, even the Commission previously acknowledged that the current V-chip system is an "acceptable" means of accomplishing Congress's objective of giving parents "an effective method . . . to block programming they believe harmful to their children." *In re Implementation of Section 551 of the Telecommunications Act of 1996*, 13 F.C.C.R. 8232, 8233 ¶ 2 (1998). If not to its own judgment, the Commission owes substantial deference at least to that of the President and the Congress. *See Turner*, 512 U.S. at 665.

II. The Remand Order Fails To Provide A Reasoned Explanation For The Agency's Radical Change In Course

When an agency undertakes "a reversal of policy," the APA's mandate of reasoned decision making requires it to "adequately explain[] the reasons" for the

change. *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Indeed, "[a]n agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (Roberts, J.). And where, as here, "an agency is applying a multi-factor test through case-by-case adjudication," "[t]he need for an explanation is particularly acute." *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.).

The Commission asserts that its explanation for its radical change in course with respect to fleeting expletives "fully satisfied the requirements of the APA." FCC Br. 17. For at least three reasons, the Commission is incorrect.

1. Of course, it is the explanation provided by the agency—not that of its lawyers (or, for that matter, Judge Leval)—that this Court must evaluate. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . . [A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."). So we look to the Remand Order itself for the agency's rationales. And in the Remand Order, far from forthrightly explaining the reasons for its change in policy, the Commission *denied* that it had changed its fleeting expletive policy *at all*. There can be no reasonable explanation for a change in agency policy when the agency refuses to acknowledge even that the policy has changed.

For nearly 30 years, the Commission generally viewed isolated utterances of expletives as falling outside the scope of its definition of indecency—either because the expletive did not depict or de-

scribe sexual or excretory activity, or, in the rare cases when the expletive did, in fact, depict or describe such activity, because the isolated and fleeting nature all but foreclosed a finding of patent offensiveness. In *Golden Globe II* and the Omnibus Order, the Commission abandoned those precedents and held that *any* use of the "F-Word" and the "S-Word" is a depiction or description of sexual or excretory activity, and that all such utterances are presumptively patently offensive.

In the Remand Order, however, the Commission purported to discover "[a] long line of precedent" supporting the notion that the "F-Word"—even when used only "for emphasis or as an intensifier"—constitutes a depiction or description of sexual activity falling within "the subject matter scope of our indecency definition." Pet. App. 73a; *see also id.* at 83a ("it has long been clear that [expletives] fall within the subject matter scope of our indecency definition, which since *Pacifica* has involved the description of sexual or excretory organs or activities"). That order similarly dismissed as "staff letters and dicta" the corpus of pre-*Golden Globe* agency precedent establishing that the fact that an expletive was uttered in a passing or fleeting manner and was not repeated weighed forcefully against a finding that the utterance was patently offensive. *Id.* at 79a. And purporting to discern no change in its policy with respect to fleeting expletives, the Commission rejected the broadcasters' argument that "Nicole Richie's comments would not have been actionably indecent prior to [the Commission's] *Golden Globe* decision." *Id.* at 80a–81a. This is hardly a "candid recognition" of a "change in policy." FCC Br. 23. It is a stubborn, and absurd, insistence that there had been no change at all. And every court of appeals that has confronted the Commission's intransigence has concluded—

correctly—that it violates the APA. *See CBS Corp. v. FCC*, — F.3d —, No. 06-3575, 2008 WL 2789307, at *12, *16 (3d Cir. July 21, 2008).

2. Nor did the Remand Order provide any rationale capable of justifying the Commission's new conclusion that any use of the "F-Word" and the "S-Word" is within the subject-matter scope of its indecency definition. Under the first step of the Commission's definition of broadcast indecency, the image or utterance "*must* describe or depict sexual or excretory organs or activities." Pet. App. 71a–72a (citing *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 8) (emphasis added). The Commission long has acknowledged that some uses of expletives such as the "F-Word" do not carry a sexual meaning and therefore often fall outside the subject-matter scope of the Commission's indecency definition. *See, e.g., In re Applications of Lincoln Dellar*, 8 F.C.C.R. at 2585 ¶ 26 (news anchor exclamation that he had "fucked that one up" held to have no sexual meaning). The Remand Order, however, came to an entirely different conclusion, holding that Cher's and Nicole Richie's obviously non-literal uses of the "F-Word" and, indeed, *any* use of the "F-Word," "falls within the scope of [its] indecency definition." Pet. App. 73a–74a.

The Commission offered the following defense of its conclusion: "Given the core meaning of the 'F-Word,' any use of that word has a sexual connotation even if [it] is not used literally." Pet. App. 73a–74a; *see also Golden Globe II*, 19 F.C.C.R. at 4978 ¶ 8 ("any use of [the 'F-Word'] or a variation, in any context, inherently has a sexual connotation"). Even if one assumes (as the Commission apparently does) that a "sexual connotation" constitutes a "depiction" or "description" of sexual activity, *but cf.*

Interstate Circuit v. City of Dallas, 390 U.S. 676, 686 (1968) (rejecting proscription of "portrayal of 'sexual promiscuity'" that was "implicit rather than explicit, *i.e.*, that it was a product of inference by, and imagination of, the viewer"), the Commission's reasoning is just an *ipse dixit*: The word is a depiction of sex because the Commission says it is a depiction of sex. Noticeably absent is *any* explanation for the *change* in the Commission's view as to the *meanings* of the "F-Word."

In this context, the Commission is obligated to explain how the "F-Word" came to develop the invariable "core meaning" that so consistently escaped the Commission's understanding for 30 years. If the Commission believes the meaning and usage of the "F-Word" have narrowed considerably since 2001—it claims *now* to have "studied the issue" (FCC Br. 18)—it is obligated at least to say so and to justify its conclusion with reasoned argument and evidence. But three times now—first in *Golden Globe II*, then in the Omnibus Order, and finally in the Remand Order—the Commission failed to do so, in the final iteration failing even to acknowledge that there had been any change at all. A "barebones incantation of . . . rationales cannot do service as the requisite 'reasoned basis' for altering its long-established policy." *Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987).

The only argument remotely resembling an explanation for the Commission's change in course came to the Commission as an afterthought: "Moreover, in certain cases, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions." Pet. App. 83a. That's it. But far from providing a justification for the Commission's

position, this argument illustrates its silliness. The issue is not confusing with respect to the programs in dispute here. For example, no viewer of the 2002 Billboard Awards could reasonably believe that Cher was actually exhorting her audience to have sexual congress with her critics, or that she was otherwise "depicting" or "describing" sexual activity. Nor is the issue arcane with respect to countless other examples drawn from actual experience, such as President Bush's famous remark to Prime Minister Blair, or Vice President Cheney's altercation with Senator Leahy on the Senate floor. *See id.* at 29a–30a.[18]

If the Commission is not required to justify changes in its views as to the meaning of particular words (which is to say, speech)—if it is permitted to redefine words on the basis of its assertedly superior "position to evaluate the connotations of language" (FCC Br. 18)—there is no effective limit on the subject-matter scope of the Commission's indecency jurisdiction. The court of appeals was right to reject the Commission's transparent efforts to circumvent its own indecency definition and expand its censorship jurisdiction without so much as an attempted, let alone reasonable, explanation.

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[18] The Commission's lawyers now argue that treating all uses of the "F-Word" and the "S-Word" as having sexual or excretory meaning is permissible because the "subtle distinctions" "between literal and figurative uses" may be lost on children. FCC Br. 35. This line of reasoning reduces for all broadcasting not just the content, but now also the vocabulary, to that fit for children. Moreover, if the Commission is correct, if a child cannot determine whether Cher actually wanted her audience to have sex with her critics, one is left to wonder how that child possibly could discern whether particular uses of those words have "artistic merit"—a determination on which the Commission's analysis of patent offensiveness now entirely turns.

3. The Commission also failed to offer any explanation for its decision to disregard completely one of the three "principal factors" it previously had identified as pivotal in determining whether material is "patently offensive"—the second step of the Commission's indecency definition. *Industry Guidance*, 16 F.C.C.R. at 8002–03 ¶¶ 8, 10. The Commission now attempts to frame its elision of the second "principal factor" as a reasonable rejection of a "per se, one-free-expletive rule" to which it supposedly had adhered. FCC Br. 17. But this case has nothing at all to do with a "one-free-expletive rule." The Commission (as opposed it its lawyers) has categorically denied ever observing such a rule, *see* Pet. App. 85a, and respondents do not ask this Court to adopt it.[19]

The change in the Commission's policy is this: Prior to *Golden Globe II*, in cases involving fleeting utterances of expletives, the Commission accorded *significant weight* to the fact that the material did not "dwell[] on or repeat[] at length" disputed expletives. *See, e.g.*, *Industry Guidance*, 16 F.C.C.R. at 8008 ¶ 17. Now the Commission accords effectively *no weight* to this "principal factor," with the result that the Commission deems *all* utterances of expletives—even fleeting utterances—as presumptively indecent, with the final determination turning on the

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[19] Because there never has been an "automatic exemption to the indecency prohibition for nonrepeated expletives," there is no basis for the Commission's "predictive judgment" (FCC Br. 37) that continuing the pre-*Golden Globe II* policy would "permit broadcasters to air expletives at all hours of a day so long as they did so one at a time." Pet. App. 85a. Broadcasters generally do not permit the broadcast of expletives even at times of day when the broadcast of *indecent* material is undoubtedly permitted. *Id.* at 86a–87a. The specter of daytime television programming heavily salted with "one free expletive" is entirely a figment of the Commission's overly active imagination.

Commission's subjective view on whether the utterance in question was "shocking" or had "artistic merit." Pet. App. 75a, 76a n.44. The case thus involves not a "one-free-expletive rule," but a "one-word-and-you're-out rule," with an exception for materials that the Commissioners and their advisors happen to like, such as *Saving Private Ryan*.

To justify *that* change in policy, the Commission argued that excusing "'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" Pet. App. 84a. But language that is not indecent threatens no cognizable harm and thus cannot be said to amount to a "blow" at all. The Commission's proffered rationale—that permitting even an isolated expletive forces viewers to absorb the "first blow"—thus takes as an assumption its ultimate conclusion, namely that a fleeting expletive constitutes "indecent language." A tautology is a grossly inadequate substitute for reasoned explanation and the court of appeals was right to reject it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This case concerns a challenge to the efforts of the Federal Communications Commission (FCC or Commission) to regulate indecent broadcast communications that come "directly into the home, the place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds," *FCC* v. *Pacifica Found.*, 438 U.S. 726, 759 (1978) (*Pacifica*) (Powell, J., concurring in part and concurring in the judgment), and can "enlarge[] a child's vocabulary in an instant," *id.* at 749. The court of appeals held that the FCC's new policy concerning the use of expletives is "arbitrary and capricious under the Administrative Procedure Act," and therefore invalid. Pet. App. 2a. In that court's view, the Commission failed to provide an adequate explanation for abandoning a per se rule that had attached dispositive weight to one factor—whether an expletive

was repeated—and in its place adopting a consistent enforcement policy that depends on a careful evaluation of context.

Respondents spend little time attempting to defend the reasoning of the court of appeals on the APA issue it decided. Instead respondents argue, incorrectly, that the Commission failed to acknowledge its change in policy, and they advance a revisionist view of both the old policy and the new policy that is inconsistent not only with the opinion below but also with arguments they have advanced at earlier stages of this litigation. To the extent that they actually address the reasoning of the court of appeals, they repeat its error of focusing on the Commission's analysis of broadcasts that are not before the Court—many of which do not involve isolated expletives at all—rather than its decision with respect to the broadcasts actually at issue here. Conspicuously absent from respondents' briefs is any effort to defend the use of the F-Word and the S-Word in the broadcasts at issue—prime-time awards shows viewed by substantial numbers of children—or to explain why the broadcasts were not patently offensive.

Respondents advance a variety of constitutional arguments against 18 U.S.C. 1464 and the Commission's enforcement of it. Because those arguments were not passed upon below, there is no need for the Court to consider them now and, indeed, doing so would contravene the rule that the judgment may not be altered in favor of a respondent that has not filed a cross-petition. That response is not, as respondents suggest (NBC Br. 15), a "bait-and-switch" on the Commission's part. In seeking certiorari, the Commission specifically stated that "[p]etitioners seek a ruling only on the APA issues addressed by the court below." Reply Br. 10. Accord-

ingly, consistent with the restraint that this Court ordinarily exercises when it can resolve a case on non-constitutional grounds, the Court should resolve the administrative-law issue decided below and then remand to allow the court of appeals to consider respondents' remaining arguments.

As respondents acknowledge (NBC Br. 13), this case in large measure concerns the "well-being of children" exposed to indecent programming broadcast into their homes. The First Amendment does not confine the FCC to the role of protecting children from only that indecent broadcast material which is "intentionally repeated 'over and over'" again (Fox Br. 15). And, as the briefs filed by respondents' amici underscore (see ACLU Br. 29-32), respondents' view of the Constitution would create a world in which children could be bombarded with indecent broadcast material (fleeting or not) during prime time viewing hours—and, indeed, 24/7. There would be no basis for the Court to adopt such an unsettling regime in a case squarely presenting respondents' audacious constitutional challenge, and there is certainly no reason for the Court to do so here, in reviewing a decision grounded on an erroneous application of statutory administrative-law principles.

A. Respondents Misread The FCC's Orders

Respondents make only a limited effort to defend the reasoning of the court of appeals. Instead, they advance a number of arguments that are inconsistent with the court's opinion—and, in some cases, with the positions they took below—and that rest on serious misinterpretations of the Commission's orders. None of respondents' arguments in this vein withstands scrutiny.

1. Respondents first insist (Fox Br. 16, 36; NBC Br. 48-49) that the Commission has denied changing its policy. The claim is inconsistent not only with the decision below but also with other portions of respondents' briefs in which they discuss the Commission's rationale for the change. See, *e.g.*, Fox Br. 28-29. Indeed, as the court of appeals itself explained, the Commission's orders left "no question that the FCC has changed its policy." Pet. App. 20a. The court quoted a paragraph of the order in which the Commission discussed the change, and it observed that the Commission had declined to issue a forfeiture because it recognized that the broadcasts in this case would have been permitted under agency precedent. *Id.* at 21a-22a (citing *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4980 ¶ 12 (2004) (*Golden Globe Awards Order*)).

Respondents' argument is also contradicted by the passages in the Commission's order describing as "seriously flawed" the Commission's earlier decisions stating "that expletives had to be repeated to be indecent," and "reaffirm[ing] that it was appropriate to disavow" those decisions. See Pet. App. 82a; see also *Golden Globe Awards Order*, 19 F.C.C.R. at 4980 ¶ 12. In addition, respondents overlook the fact that the Commission did not sanction Fox for either broadcast at issue here. And the only reason for its forbearance, in the case of the 2002 Billboard Music Awards, was its recognition that "it was not clear at the time that broadcasters could be punished for the kind of comment at issue here." Pet. App. 122a; see *id.* at 124a & n.206.

2. Respondents also assert (Fox Br. 19, 26; NBC Br. 53) that the Commission did not have a per se rule against liability for isolated expletives. As the court of

appeals explained, however, "prior to the *Golden Globes* decision the FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime." Pet. App. 20a. The networks themselves urged that conclusion in their Second Circuit briefs. See Fox C.A. Br. 21 ("For 30 years following *Pacifica*, the FCC respected the narrowness of *Pacifica* by repeatedly reaffirming that isolated or fleeting expletives were not punishable."); NBC C.A. Br. 39 ("[T]he Commission expressly rejected the notion that broadcasters could be held liable for a single word."); CBS C.A. Br. 4. And in opposing certiorari, Fox reiterated that, "[f]or almost 30 years following *Pacifica*, the FCC did not consider fleeting, isolated or inadvertent expletives to be indecent." Fox Br. in Opp. 4.

Although the Commission has long stressed the importance of context in indecency determinations, see *In re Infinity Broad. Corp. of Penn.*, 3 F.C.C.R. 930 (1987), its old policy was to depart from a contextual analysis when evaluating isolated expletives. In that setting, one factor—the fact that the expletive was not repeated—was dispositive. The Commission clearly expressed that policy in 1987 when it stated: "If a complaint focuses solely on the use of expletives, we believe that * * * deliberate and repetitive use in a patently offensive manner is a *requisite* to a finding of indecency." *In re Pacifica Found.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (emphasis added). By contrast, the Commission explained, "[w]hen a complaint goes beyond the use of expletives, * * * repetition of specific words or phrases is not necessarily an element critical to a determination of indecency." *Ibid.* Fox does not cite any Commission decision predating the *Golden Globe Awards Order* that renounces the

1987 per se exclusion of isolated expletives or that finds an isolated expletive to be indecent.[1]

3. Respondents mischaracterize not only the Commission's old policy but also its new one. Fox asserts (Br. 27) that under the Commission's new approach, certain words are presumed indecent unless the FCC can identify factors that mitigate the language's offensiveness. In support of that theory, Fox relies on the passage in the *Golden Globe Awards Order* in which the Commission stated that any use of the F-Word "in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition." 19 F.C.C.R. at 4978 ¶ 8. But that statement simply means that any use of the F-Word falls within the subject-matter scope of the indecency definition in that it "describe[s] or depict[s] sexual or excretory organs or activities." *In re Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8002 ¶ 7 (2001) (*Industry Guidance*). That is only the first component of the indecency test. To be indecent, material must also satisfy the second component of the test: it "must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8. (emphasis omitted). In applying that component of the test, "the *full context* in which

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[1] In *CBS Corp.* v. *FCC*, 535 F.3d 167 (2008), the Third Circuit held that, until the *Golden Globe Awards Order*, "the FCC's policy was to exempt fleeting or isolated *material* from the scope of actionable indecency." *Id.* at 180 (emphasis added). The Third Circuit's description of the Commission's policy was inaccurate, because, as shown above, the policy did not extend to all fleeting "material," such as images. But for pertinent purposes, the prior policy did exempt isolated *expletives* from indecency regulation.

the material appeared is critically important," and the inquiry is "highly fact-specific." *Id.* at 8002-8003 ¶ 8.

The Commission's evaluation of context focuses on three principal factors: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Industry Guidance*, 16 F.C.C.R. at 8003 ¶ 10 (emphases omitted). NBC errs in asserting (Br. 53-54) that the Commission gives no weight to the second factor in cases involving expletives. Whereas the Commission's old policy made that factor dispositive in *all* isolated expletive cases, the new policy considers it, along with all other relevant factors, in determining whether a broadcast is indecent. Pet. App. 82a-83a.

In the case of the 2002 Billboard Music Awards, for example, the Commission looked to the explicit and graphic nature of the language, the program content as it affected the "composition of the audience," and the rating given to the program. Pet. App. 76a. It also considered whether the material was presented in a pandering or shocking manner, and it determined that it was. *Id.* at 75a. It acknowledged that "the offensive dialogue here was relatively brief," but it concluded that that fact was "not dispositive under these particular circumstances." *Id.* at 86a. Only after weighing all of the "factors in [the] contextual analysis" did the Commission conclude that the broadcast was "patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 74a. Fox has not disputed any of the specific findings underlying the Com-

mission's determination, nor has it made any effort to articulate a theory of contemporary community standards under which the gratuitous prime-time broadcast of the F-Word and the S-Word under these circumstances would not be patently offensive.

B. The FCC Gave A Reasonable Explanation For Its Change In Policy

To the extent that they attempt to defend the opinion below, respondents largely repeat the errors of the court of appeals. The Commission's explanation for its change in policy fully satisfied the requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and the court of appeals erred in second-guessing the agency's considered judgment.

1. The Commission's new policy appropriately takes account of context

The Commission explained that the "most important[]" reason for its change in policy was that "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." Pet. App. 83a. The Commission noted that with respect to cases other than those involving isolated expletives, "[i]n evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination." *Ibid.* That explanation, by itself, is sufficient to satisfy the APA's requirement that an agency explain a change of policy. The court of appeals did not address it but instead concluded that the regulation of isolated expletives was irrational because the Commission did not "take the position that *any* occurrence of an expletive is indecent." *Id.* at 26a. Noth-

ing in the APA requires the Commission to adopt the blunt tool of an all-or-nothing policy, and respondents' efforts to defend the court's holding are unavailing.

a. Respondents fail to acknowledge that "[w]ords that are commonplace in one setting are shocking in another," and therefore the offensiveness of certain words depends on context. *Pacifica*, 438 U.S. at 747 (plurality opinion). Nor do they recognize that the Commission is permitted—indeed, required—to balance competing objectives in enforcing its indecency policy. Instead, respondents argue (Fox Br. 29) that consideration of context is irrational because children "cannot distinguish between the use of an expletive in a Shakespearean drama and in an awards show." But this Court itself drew precisely that contextual distinction in *Pacifica* when it contrasted the Carlin monologue with the broadcast of expletives in "an Elizabethan comedy" or a reading of *The Canterbury Tales*. See 438 U.S. at 750 & n.29. As the Court explained, it is unlikely that a performance of Shakespeare or Chaucer would "command the attention of many children who are both old enough to understand and young enough to be adversely affected by" hearing expletives. *Id.* at 750 n.29.

Like much of the reasoning of the court of appeals, respondents' attack on the Commission's evaluation of context is not a criticism of the changed enforcement policy with respect to isolated expletives; it is a criticism of any effort to enforce Section 1464. See Pet. App. 54a (Leval, J., dissenting). Thus, Fox does not even attempt to explain why the comments in the Billboard Music Awards broadcasts were not patently offensive. Instead, in an effort to divert attention from the broadcasts at issue in this case, it complains (Br. 31-33) about the Commission's determinations in other cases that are

not before the Court, do not involve isolated expletives, and arise in different contexts. The logic of Fox's position in discussing those cases is that if expletives are permitted in *any* broadcast, they must be permitted in *every* broadcast.

Respondents' objections about unrelated cases extend even to cases that were resolved in their favor. Before the Commission, CBS argued that the use of an expletive on "The Early Show" should not be considered indecent because "[w]here * * * an isolated expletive is spoken during a *bona fide* news interview, it is not actionable." C.A. App. A720. The Commission agreed that it was appropriate to "proceed with the utmost restraint when it comes to news programming," and it therefore determined that "The Early Show" was not indecent. Pet. App. 127a. But now respondents, including CBS, cite that finding as an example of the Commission's alleged inconsistency. See NBC Br. 7, 26.

Fox goes further and claims (Br. 31) that as a result of the different treatment afforded to an awards show and a news broadcast, "[t]here simply is no way for broadcasters to determine * * * whether and when language will be deemed indecent." But there is no reason to believe that respondents are incapable of distinguishing between a bona fide news show and entertainment programming like the Billboard Music Awards. See Pet. App. 128a (explaining that the Commission will "defer to [a broadcaster's] plausible characterization of its own programming").[2]

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[2] Fox's argument (Br. 32) that consideration of context threatens live programming is also implausible. The Commission cannot impose a penalty without a finding of willfulness or scienter. See 47 U.S.C. 503(b)(1). The Commission made no such finding here, because it did

b. Respondents' criticism of a contextual approach to indecency determinations rests on a misunderstanding of what the consideration of context entails. Fox contends (Br. 33) that the *Pacifica* Court's understanding of context was limited to "the time of the broadcast, the nature of the program, and its likely audience (particularly whether that audience included children)." That is incorrect, as the Court made clear when it explained that context "requires consideration of a host of variables." 438 U.S. at 750. In any event, even if the assessment of context were limited to the factors identified by Fox, the context of these broadcasts would still support the Commission's indecency findings: the broadcasts aired during prime time hours before 10 p.m., the time of day when children are most likely to be in the audience; the broadcasts were awards shows of the kind that many children watch; and there were in fact large numbers of children in the audiences for both broadcasts. Pet App. 99a n.117, 119a.

NBC contends (Br. 20) that the Commission's contextual determinations of patent offensiveness turn on "the Commissioners' individual subjective evaluations of 'artistic merit.'" That is incorrect. Although the phrase "artistic merit" appears in the Commission's order, Pet. App. 76a n.44, 120a n.191, the Commission made no finding as to the merit, or lack thereof, of either of the "Billboard Music Award" broadcasts. Instead, the Commission merely noted that "Fox does not argue that [the] remarks had any artistic merit or were necessary to convey any message." *Id.* at 76a n.44. Therefore, whatever the appropriate role for consideration of artistic merit,

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not impose a forfeiture. Had it attempted to do so, the broadcasters would have been free to argue that they lacked the requisite mens rea.

that issue is not presented in this case, where the use of expletives was concededly gratuitous.

2. The Commission reasonably concluded that vulgar expletives need not be used in a literal sense to be indecent

Fox makes no effort to defend the court of appeals' determination that non-literal uses of expletives fall outside of the subject-matter scope of the indecency definition. Pet. App. 29a-30a. Instead, Fox claims only (Br. 41 n.17) that "the FCC lacked any record evidence" on the point. That is incorrect, as the Commission's order demonstrates. See Pet. App. 74a & nn.39-40, 118a. More importantly, neither Fox nor the other respondents attempts to refute the Commission's determination that the F-Word "has a sexual connotation even if the word is not used literally," *id.* at 74a, and that "the word's power to insult and offend derives from its sexual meaning," *id.* at 118a. Nor do respondents come to terms with the logical implication of the court's reasoning, which is that the Commission would lack the authority to regulate any non-literal uses of offensive sexual or excretory terms, no matter how often they are repeated or what time of day they are broadcast.

NBC argues (Br. 50) that the Commission "has acknowledged that some uses of expletives such as the 'F-Word' do not carry a sexual meaning and therefore often fall outside the subject matter scope of the Commission's indecency definition." That is incorrect. NBC relies on *In re Lincoln Dellar*, 8 F.C.C.R. 2582 (Audio Servs. Div. 1993), but there the Commission's staff determined that a broadcaster's inadvertent use of an expletive did not "warrant further Commission consideration in light of the isolated and accidental nature of the

broadcast." *Id.* at 2585 ¶ 26. Nowhere in the order did the staff consider whether the expletive fell within the subject-matter scope of the indecency definition.

3. The Commission reasonably determined that a change in its enforcement policy was appropriate

The court of appeals believed that the Commission's new policy was unnecessary because "broadcasters have never barraged the airwaves with expletives even prior to *Golden Globes*," Pet. App. 30a, and because the record "is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation," *id.* at 32a. As explained in the opening brief, neither of those rationales was an appropriate basis for setting aside the Commission's judgment.

a. Fox does not seem to dispute (Br. 38) the Commission's observation, that, as a matter of logic, a one-free-expletive rule would allow broadcasters to air offensive sexual and excretory terms at any time of day—regardless of the number of children in the audience—so long as they did so one at a time. Yet Fox offers no reason why the Commission should not have been able to consider where the logic of its policies would extend, whether or not the regulated community might exercise self-restraint in the short run. In any event, the Commission identified evidence to support the prediction that the use of expletives might increase in the absence of a change of policy. See *Golden Globe Awards Order*, 19 F.C.C.R. at 4979 ¶ 9 n.26. And Congress had similar evidence before it when, based in part on Fox's broadcast of the 2003 Billboard Music Awards, it enacted the Broadcast Decency Enforcement Act of 2005, Pub. L.

No. 109-235, 120 Stat. 491. See H.R. Rep. No. 5, 109th Cong., 1st Sess. 2 (2005).

b. Fox appears to recognize (Br. 35-38) that there is no basis in the APA for requiring the Commission to identify "evidence" of harm before it may enforce an Act of Congress. Instead, Fox suggests that the First Amendment requires the Commission to amass evidence that expletives are harmful. As explained below, that constitutional argument is not properly before the Court, but in all events, it is foreclosed by *Pacifica*, which upheld the Commission's authority to enforce Section 1464 even without a scientific demonstration of harm caused by the expletives in the Carlin monologue. As the District of Columbia Circuit has explained, "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material." *Action for Children's Television* v. *FCC*, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc) (*ACT III*), cert. denied, 516 U.S. 1043 (1996); see *Ginsberg* v. *New York*, 390 U.S. 629, 641 (1968). And as this Court observed in *Pacifica*, the exposure to indecent language can "enlarge[] a child's vocabulary in an instant." 438 U.S. at 749.

C. This Court Should Remand To Allow The Court Of Appeals To Consider Respondents' Other Challenges To The FCC's Order

Respondents ask this Court to consider a variety of far-reaching constitutional challenges to the Commission's order and broadcast-indecency regulation more generally. See Fox Br. 42-50; NBC Br. 15-47. The Court should decline that request and should instead

remand the case to the court of appeals to allow it to consider respondents' arguments in the first instance.

1. Consideration of respondents' constitutional arguments in this case is precluded by the rule that the judgment may not be altered in favor of a respondent that has not filed a cross-petition. That rule is an analog of the rule that "an appellate court may not alter a judgment to benefit a nonappealing party," a rule that the Court has repeatedly described as "inveterate and certain." *Greenlaw* v. *United States*, 128 S. Ct. 2559, 2564 (2008) (quoting *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191 (1937)); see *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). Respondents suggest (NBC Br. 17-19) that they are simply presenting alternative grounds for affirmance and that they do not seek to alter the judgment below. But the judgment below was a remand to the Commission with instructions to provide a reasoned analysis for its change in policy. Pet. App. 34a, 144a. If, as respondents argue, the Commission's entire "indecency regime is patently unconstitutional" (Fox Br. 43), then these and all other indecency cases should simply be dismissed. Absent a cross-petition, respondents may not convert the judgment of the court of appeals from a remand for further explanation to one directing outright dismissal. See *Board of Trs. of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 485 (1989); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970); Eugene Gressman et al., *Supreme Court Practice* § 6.35, at 490-491 (9th ed. 2007).

2. Even if respondents had cross-petitioned, it would be inappropriate to consider their constitutional arguments at this stage. Recognizing that it is "a court of review, not of first view," this Court generally declines to consider arguments that were not passed upon below.

Cutter v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); see *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001). That prudential rule has particular force in cases like this one where parties ask this Court to reach constitutional questions not decided below. See, *e.g.*, *Ashcroft* v. *ACLU*, 535 U.S. 564, 585-586 (2002) (remanding to allow the court of appeals to consider various First Amendment challenges to the Child Online Protection Act, 47 U.S.C. 231, and explaining that "[w]hile respondents urge us to resolve these questions at this time, prudence dictates allowing the Court of Appeals to first examine these difficult issues.").

NBC asserts (Br. 16) that the court of appeals has already "addressed [respondents'] challenges on the merits." But the court of appeals explicitly "refrain[ed] from deciding the various constitutional challenges * * * raised by the Networks." Pet. App. 35a. Moreover, although the panel majority offered some "observations" on those challenges, *id.* at 35a-40a, it recognized that its observations were "dicta," *id.* at 35a n.12. And even then, the majority did not actually offer a definitive view of respondents' arguments, but merely suggested that it was "skeptical" of the FCC's position, *id.* at 35a, and "sympathetic" to that of respondents, *id.* at 36a. This Court's practice of reviewing "judgments, not statements in opinions," is especially sound when the statements are so tentatively expressed. *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)).

In addition, several features of this case make it a particularly inappropriate vehicle for addressing respondents' constitutional challenges. First, respondents' constitutional arguments amount to an attack on the regulation of broadcast indecency in general, rather

than the specific change in policy at issue. Second, several of respondents' arguments, such as the claim that the "technological and cultural developments of the last 30 years" have undermined *Pacifica* (NBC Br. 35), or that technologies to allow parents to block particular broadcasts would be a less-restrictive alternative to regulation (NBC Br. 43-47), turn on disputed factual issues. Although the Commission has made findings addressing those issues, Pet. App. 105a-112a, this Court would benefit from allowing the court of appeals to review those findings in the first instance. Third, the only broadcaster whose programs are directly at issue in this case is Fox, and it has addressed the constitutional issues only in a cursory fashion (Br. 42-50). See American Acad. of Pediatrics Br. 4 (urging the Court to decide this case based on the APA issue decided below).

3. Respondents contend that the government has invited consideration of their constitutional arguments because it supposedly "*conceded* that this case would not meet certiorari standards apart from the need to consider the Second Circuit's constitutional analysis." NBC Br. 16; see Fox Br. 42-43. NBC goes so far (Br. 15) as to accuse the government of a "bait-and-switch." Those arguments are baseless. The petition for a writ of certiorari focused on the fact that the court of appeals had "fault[ed] the Commission for exercising the contextual judgment that *Pacifica* mandated" and that its decision was "inconsistent with settled principles governing review of agency action." Pet. 14. More to the point, the Commission's reply brief at the petition stage (at 10) specifically stated: "Petitioners seek a ruling only on the APA issues addressed by the court below; this Court could then remand to allow the court of appeals to consider the remaining issues in the case."

Respondents' claim is particularly odd given that three of the networks maintained, at the petition stage, that their constitutional arguments were *not* presented here. In its brief in opposition (at 19), Fox—then joined by CBS and ABC—emphasized that "the Second Circuit did not even reach Fox's additional substantive challenges to the FCC's new indecency regime," and it argued that "even if this Court were to accept this case and reverse the Second Circuit's administrative law holding, the Court would still have to remand the case to the Second Circuit to permit it to consider Fox's * * * constitutional arguments." The networks were correct at the time, and their about-face attempt to encourage this Court to reach momentous constitutional questions that were not decided below should be rejected.

4. Fox suggests (Br. 21-22) that it is necessary for the Court to consider its constitutional arguments because those arguments "undermine the FCC's claim to deference" under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). But the government does not argue for *Chevron* deference here, because this case is about the reasonableness of the FCC's explanation for its decision to change its enforcement policy, not about the interpretation of a statute. The FCC's interpretation of "indecent," as that term is used in Section 1464, is unchanged from the interpretation that this Court approved in *Pacifica*. Compare Pet. App. 71a, with *Pacifica*, 438 U.S. at 731-732. All that has changed is the Commission's policy in enforcing Section 1464. There is therefore no occasion to accept Fox's suggestion to apply the canon that a statute should be interpreted, when possible, so as to avoid serious doubt as to its constitutionality. In any event, that canon is applicable only when there is one interpretation that raises serious constitu-

tional doubt and another that does not. Here, respondents' constitutional arguments are directed not at the Commission's change in policy with respect to isolated expletives but at the entire regime of broadcast-indecency regulation. See Fox Br. 21 (arguing that "there are serious constitutional objections to the FCC's regulation of indecency at all"). Thus, any constitutional doubt raised by the Commission's new policy would exist equally under the Commission's old policy. For that reason, too, there is no need for the Court to consider respondents' constitutional arguments to resolve the administrative-law issues decided below.

D. The FCC's Enforcement Of Section 1464 Is Constitutional

If this Court does reach respondents' constitutional challenges, it should reject them.

1. a. This Court held in *Pacifica* that the First Amendment does not prohibit the FCC from regulating indecent broadcasting. Despite all their heated rhetoric, respondents do not explicitly ask this Court to overrule *Pacifica*, and there is no basis for the Court to do so. Cf. *Randall* v. *Sorrell*, 548 U.S. 230, 263-264 (2006) (Alito, J., concurring in part and concurring in the judgment).

"[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. Not only have the broadcast media "established a uniquely pervasive presence in the lives of all Americans," but "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Ibid.* Moreover, "broadcasting is

uniquely accessible to children." *Id.* at 749. Unlike indecent material sold in bookstores and movie theaters, for example, indecent speech broadcast over the air may not "be withheld from the young without restricting the expression at its source." *Ibid.* "[S]ociety's right to protect its children from this kind of speech" provides a particularly strong reason for respecting "everyone's interest in not being assaulted by offensive speech in the home." *Id.* at 760 (Powell, J., concurring in part and concurring in the judgment).

As this Court has held, regulation of the broadcast spectrum, a "scarce and valuable national resource," "involves unique considerations." *FCC* v. *League of Women Voters*, 468 U.S. 364, 376 (1984). Because "there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388 (1969); see American Acad. of Pediatrics Br. 4-15. As a result, even where regulation of broadcast speech that "lies at the heart of First Amendment protection" is concerned, the government's interest need only be "substantial" and the restriction need only be "narrowly tailored" to further that interest, not the least restrictive available. *League of Women Voters*, 468 U.S. at 380, 381.

This Court has recognized the common-sense fact that broadcast indecency poses a direct threat to the well-being of the nation's children. See *Pacifica*, 438 U.S. at 749; *id.* at 757-759 (Powell, J., concurring in part and concurring in the judgment). It cannot reasonably be disputed that the government has a substantial—or, indeed, "compelling"—"interest in protecting the physi-

cal and psychological well-being of minors," nor that this interest "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Commc'ns, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). The government's interests in the "well-being of its youth" and in supporting "parent's claims to authority in their own household" can justify "the regulation of otherwise protected expression." *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg*, 390 U.S. at 639, 640). And the Court should likewise reject Fox's perverse suggestion (Br. 44-45) that, because American children face a growing threat—with the advancement of technology such as the Internet—of being exposed to harmful speech, there is less of a constitutional justification for protecting them from broadcast indecency.

The FCC's enforcement of Section 1464 is narrowly tailored to promote that vital interest in protecting our children. Radio and television stations are prohibited from broadcasting indecent material only "between 6 a.m. and 10 p.m." 47 C.F.R. 73.3999(b). By channeling indecent broadcasting to times of day in which fewer children are in the audience, but which nonetheless remain accessible to adult viewers and listeners, the Commission permissibly advances the government's interests "without unduly infringing on the adult population's right to see and hear indecent material." *ACT III*, 58 F.3d at 665; see *id.* at 663; *Pacifica*, 438 U.S. at 750 n.28.

Because of *Pacifica*, a generation of American parents has expected that broadcast television (at least before 10 p.m.) will not be indecent. They understand that there is a difference between what is permissible over broadcast television and what is permissible on cable, and they make choices for their children based on that understanding on a daily basis. In short, the regime of

broadcast-indecency regulation upheld in *Pacifica* has "become part of our national culture." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). This Court should not upset the settled expectations that have developed in the three decades since that decision.

"[E]ven in constitutional cases," *stare decisis* "carries such persuasive force" that the Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). There is no such justification here. *Pacifica* "has in no sense proven 'unworkable,'" nor have its factual premises "so changed, or come to be seen so differently, as to have robbed [it] of significant application or justification." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 855 (1992) (citation omitted). To the contrary, the FCC's findings in this case demonstrate the continuing pervasiveness of broadcast television. Pet. App. 106a-108a; see ACLU Br. 36 ("broadcasting remains pervasive"). As the Commission noted, in 2003, over 98% of households had at least one television, and despite the availability of cable and satellite service, millions of households still rely exclusively on over-the-air broadcasting. *Id.* at 106a-107a. Moreover, the bare number of cable and satellite service subscribers does not reflect the large disparity in viewership that still exists between broadcast and cable television programs. *Id.* at 108a; cf. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 190 (1997).

Broadcast media also remain uniquely accessible to children. Two thirds of children aged 8 to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections. Pet. App. 107a-108a. Cable offers parents some choice in their selection of a package of channels, which may enable

them to avoid channels showing programs that, in their judgment, are inappropriate for children. In contrast, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters." *ACT III*, 58 F.3d at 660. As a result, members of the broadcast audience, unlike consumers of audio and video programming distributed by other means, "are confronted without warning with offensive material." *Ibid.*; see Pet. App. 111a-112a (explaining that "[b]roadcast television is also significantly different from the Internet"). *Pacifica*'s premises remain valid today.

b. NBC contends (Br. 39-43) that, even if other forms of broadcast indecency may be regulated, the First Amendment prohibits the regulation of isolated expletives. That argument finds no support in *Pacifica*, which refrained from deciding whether "an occasional expletive," such as that in "a conversation between a cab driver and a dispatcher," or "a telecast of an Elizabethan comedy," would be sanctionable. 438 U.S. at 750. Nor is there any reason to suppose that the Constitution creates a categorical exemption for all isolated utterances—an exemption under which broadcasters could gratuitously broadcast any number of highly offensive sexual or excretory terms in the middle of the afternoon, so long as they did so one at a time. NBC claims (Br. 41) that its position is supported by *Cohen* v. *California*, 403 U.S. 15 (1971), but while that case did involve a single expletive, it did not involve broadcasting. See *Pacifica*, 438 U.S. at 749 & n.27. Moreover, there is a world of difference between Cohen's "political statement in a public place," *id.* at 747 n.25, and indecent language broadcast directly into one's home.

2. Respondents contend (Fox Br. 48-50; NBC Br. 20-30) that Section 1464 is unconstitutionally vague, but

they have made no effort to show that there is *any* understanding of contemporary community standards that would permit the gratuitous broadcast of the F-Word and the S-Word in the context at issue here during a nationally televised awards show when children constitute a substantial portion of the viewing audience. Thus, whatever uncertainty might exist at the periphery of an indecency standard, there is no uncertainty about the application of the test in this case.

"A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). This Court has "relaxed that requirement in the First Amendment context," but only by "permitting plaintiffs to argue that a statute is *overbroad* because it is unclear whether it regulates a substantial amount of protected speech." *United States* v. *Williams*, 128 S. Ct. 1830, 1845 (2008) (emphasis added). Thus, a court considering overbreadth "should evaluate the ambiguous as well as the unambiguous scope of the enactment," *Village of Hoffman Estates*, 455 U.S. at 494 n.6, but other than the role vagueness concerns may play in the overbreadth analysis, vagueness does not provide for the same exception to third-party standing limitations as the overbreadth doctrine. Here, respondents have advanced only a freestanding vagueness challenge, but they have not argued that Section 1464's prohibition on indecency is overbroad. Respondents therefore may not assert a facial vagueness challenge in this case to the indecency regime.

In any event, such a challenge would lack merit because, as several courts of appeals have recognized, the FCC's definition of indecency "is virtually the same defi-

nition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case," so when this Court "h[e]ld the Carlin monologue indecent," it necessarily signaled that it "did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338-1339 (D.C. Cir. 1988) (R.B. Ginsburg, J.) (*ACT I*) (citation omitted); see *Dial Info. Servs. Corp. of N.Y.* v. *Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992); *Information Providers' Coalition for Def. of the First Amendment* v. *FCC*, 928 F.2d 866, 874-875 (9th Cir. 1991). Respondents rely on *Reno* v. *ACLU*, 521 U.S. 844 (1997), which invalidated a statute regulating indecency on the Internet. But *Reno* expressly distinguished *Pacifica*, so far from casting doubt on the validity of broadcast-indecency regulation, *Reno* recognizes its continuing validity. See *id.* at 867-868.[3]

3. Respondents also argue (Fox Br. 45-48; NBC Br. 43-47) that availability of the "V-Chip," which permits parents to block certain programming, makes Congress's broadcast-indecency prohibition unconstitutional. That argument is flawed, because regulations of broadcasting are subject only to intermediate scrutiny, under which, "[s]o long as the means chosen are not substantially broader than necessary * * * the regulation will not be invalid simply because a court concludes that

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[3] Respondents and their amici relatedly suggest that uncertainty over the definition of indecency will lead to self-censorship. The record does not bear that out. In any event, any threat of self-censorship of the F-Word or S-Word "surely lie[s] at the periphery of First Amendment concern." *Pacifica*, 438 U.S. at 743 (plurality opinion); see *id.* at 743 n.18.

the government's interest could be adequately served by some less-speech-restrictive alternative." *Turner Broad. Sys., Inc.*, 520 U.S. at 218 (citation omitted). In any event, even under strict scrutiny, the proffered less-restrictive means must be "effective" in furthering the government's goals. *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004). Here, it is undisputed that the V-chip would not have been effective at all in preventing a child's exposure to the indecent language used by Nicole Richie and Cher. The two broadcasts in question were misrated, so that even a parent with full knowledge of the V-chip and the television rating system who sought to use those tools to shield her child from indecent language would have been unable to do so. Pet. App. 76a-78a & n.47, 119a & n.190.

Respondents have not come close to showing that the V-chip provides a basis for a facial challenge to Section 1464. See *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1190-1191 (2008). Although the V-chip provides parents with "some ability to control their children's access to broadcast programming," the Commission found that that ability is too limited in practice for the technology to serve as an effective alternative to regulation. Pet. App. 109a-110a; see American Acad. of Pediatrics Br. 15-36. Many televisions have no V-chip capability, "and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it." Pet. App. 109a. In addition, misrated programming is common; V-chip "content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." *Id.* at 110a n.162 (quoting Dale Kunkel et al., *Deciphering the V-Chip: An Examination of the Television Industry's*

Program Rating Judgments, 52 J. Commc'ns 112, 136 (2002)). Because of those obstacles to effective implementation of its protections, the V-chip (and similar measures) cannot be a less-restrictive alternative.

4. Finally, it bears noting where respondents' constitutional arguments would lead the Court. The logic of respondents' frontal constitutional attack on the regulation of broadcast indecency leads to a regime in which *no* regulation of broadcast indecency is permitted, see ACLU Br. 33-37, such that broadcasters could bombard children with indecent language (fleeting or not) at any point during the day, including when children are most likely to be in the audience. And there is no reason to assume that broadcasters will not take advantage of any opening created by this Court. Indeed, as it stands, respondents' amici argue (ACLU Br. 31) "there is simply not enough time after 10 p.m." for all of the speech that they believe is "endangered" by the Commission's current policy. The First Amendment does not require the government to throw up its hands and give up on protecting the nation's children from the seriously harmful effects of broadcasting indecent material directly into their homes. And there is no reason for the Court to entertain, much less embark on, such a radical constitutional shift in reviewing the court of appeals' ruling in this case (erroneously) finding a violation of the APA.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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v.

FOX TELEVISION STATIONS, INC. ET AL.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR *AMICUS CURIAE* ABC TELEVISION AFFILIATES ASSOCIATION SUPPORTING RESPONDENTS

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BRIEF FOR *AMICUS CURIAE* ABC TELEVISION AFFILIATES ASSOCIATION

Interest of *Amicus Curiae*[1]

Amicus curiae ABC Television Affiliates Association ("ABC Affiliates Association") is a non-profit trade association whose members consist of approximately 170 local television broadcast stations throughout the country that are affiliated with the ABC Television Network. The ABC Affiliates Association actively participates before the Federal Communications Commission ("FCC" or "the Commission"), Congress, and the courts on matters affecting the television broadcast industry.

The ABC Affiliates Association has a strong interest in the outcome of this case because the FCC's broadcast indecency enforcement policy directly and substantially affects the exercise by its members of their First Amendment freedoms.[2] The ABC Affiliates

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to S. Ct. Rule 37.3. Pursuant to S. Ct. Rule 37.6, counsel for *amicus curiae* state that no counsel for any party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] One of the ABC Affiliates Association's member stations—KMBC-TV, Kansas City, Missouri—was among those stations cited by the FCC for broadcasting indecent material in the FCC's original order, based on the station's broadcast of several episodes of the ABC Television Network drama *NYPD Blue* in which a character used the term "bullshit." *See Complaints*

(continued...)

Association and its member stations have a particular interest in the resolution of this case in a manner that clarifies the Commission's authority, consistent with the First Amendment, to regulate the broadcast of "fleeting expletives."

Summary of the Argument

The United States Court of Appeals for the Second Circuit concluded that the *Omnibus Remand Order*, which implemented the FCC's new indecency enforcement policy allowing the proscription of the broadcast of a single, fleeting expletive, was arbitrary and capricious under the Administrative Procedure Act ("APA") because the Commission had failed to

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(...continued)
Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 2664 (2006)("*Omnibus Order*"). The licensee of KMBC filed a petition for review of the *Omnibus Order*, and ABC, Inc., operator of the ABC Television Network, and the ABC Affiliates Association were granted intervenor status. After transfer and consolidation of various petitions in the United States Court of Appeals for the Second Circuit, the ABC Affiliates Association was a party in the case before the Second Circuit in which ABC, other broadcast networks, and several *amici* challenged the indecency determinations made in the *Omnibus Order*. On remand from the Second Circuit, the Commission reversed on procedural grounds the indecency determination against KMBC's broadcast of certain material contained in the *NYPD Blue* episodes, although the Commission reaffirmed the indecency determinations at issue here. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8*, 2005, 21 FCC Rcd 13299, (2006), ¶ 75 ("*Omnibus Remand Order*"). Although a party below, the ABC Affiliates Association has elected to participate in the instant matter as *amicus curiae*.

articulate a reasoned explanation for its shift in policy. (Pet. App. 25a-35a.) The Second Circuit was correct that the *Omnibus Remand Order*—and the new broadcast indecency enforcement policy that it reflects—is unlawful under the APA. However, that is true not only because the Commission failed to explain adequately its abrupt shift in policy, but also because the Commission's new enforcement policy is directly contrary to the APA: The Commission's new indecency enforcement policy is, on its face, both "not in accordance with law" and "contrary to constitutional right" because that policy is directly contrary to this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Commission's new policy is, therefore, unlawful under the APA—regardless of any explanation for that particular policy offered by the Commission.

Accordingly, it is not necessary, as some parties have suggested, for the Court to revisit its decision in *Pacifica*, which narrowly affirmed the Commission's then-existing and far narrower indecency enforcement policy, or to revisit *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which affirmed the statutory public trustee regulatory framework for the broadcast media.

Argument

THE COMMISSION'S BROADCAST INDECENCY ENFORCEMENT POLICY IS UNLAWFUL UNDER THE APA

I. The APA Requires That Agency Action Be "In Accordance with Law" and Not Contrary to Constitutional Right

The Second Circuit determined that the *Omnibus Remand Order* was arbitrary and capricious—and hence unlawful—under the APA because it implemented an abrupt, unannounced shift in the Commission's indecency enforcement regime without adequate explanation. Consequently, the Second Circuit concluded that the Commission's new "fleeting expletives" policy must be set aside unless the agency, on remand, could provide a reasoned explanation for the change. (Pet. App. 25a-35a, 45a-46a.) The parties dispute the adequacy of the Commission's explanation and the correctness of the Second Circuit's conclusion. *See, e.g.*, Brief for Petitioner at 20-26; Brief for Respondent Fox Television, Inc. at 18-42. However, this Court need not resolve the issue of whether the Commission adequately explained its new policy. Legal analysis under the APA does not necessarily end with a determination that an agency has or has not adequately *explained* a change in policy. In this case, no remand to the agency is necessary for the Court to conclude that the FCC's new fleeting expletives policy, regardless of its justification, is invalid under the APA.

The APA makes unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as well as

agency action "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2). Agency action is "not in accordance with law" when it cannot be reconciled with settled precedent. *See, e.g.*, *CBS Corp. v. FCC*, No. 06-3575, --- F.3d --- (3d Cir. July 21, 2008) (slip op. at 64 n.25) (finding agency determination of employment status "contrary to settled law" in light of *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)); *Jilin Henghe Pharmaceutical Co. v. United States*, 342 F. Supp. 2d 1301, 1309 (Ct. Int. Trade 2004) ("An agency's action . . . is not in accordance with law if it conflicts with either a statute or a binding court decision."). The APA thus requires agency action to be in accordance, not only with settled constitutional principles and limitations, but also with court decisions construing and applying those principles and limitations.

Even assuming *arguendo* that the Commission is correct that it offered a "reasoned explanation" for its dramatic shift in enforcement policy regarding the broadcast of a fleeting expletive, its new policy, nevertheless, cannot withstand scrutiny under the APA for the independent reason that the Commission's policy change is both "contrary to constitutional right" and "not in accordance with law" because it cannot be reconciled with this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

II. The Commission's Fleeting Expletives Enforcement Policy Is Unlawful Under the APA Because It Is Contrary to *Pacifica*

Pacifica's narrow holding—and its construction of

the limitations on broadcast indecency regulation mandated by the First Amendment—provides no support for an FCC finding that Fox broadcast indecent or profane material where the "indecent" material consisted of an isolated, unscripted expletive aired during the course of two different two-hour live awards shows.

In a portion of the opinion that commanded a majority of the Court, *Pacifica* noted that its "narrow[]" holding does not sanction the exercise of Commission regulatory authority over a single, fleeting expletive: The Court there expressly did not "decide[] that an occasional expletive in [an Elizabethan comedy] would justify any sanction . . . ." *Pacifica*, 438 U.S. at 750.

Any doubt about the narrowness of the regulatory authority endorsed by *Pacifica* is eliminated by the separate concurring opinion of Justice Powell, without which there would have been no majority. Writing separately to underscore that *Pacifica* should not be read to confer upon the Commission "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from *momentary* exposure to it in their homes," *id.* at 759-60 (Powell, J., concurring in part and concurring in the judgment) (emphasis added), Justice Powell approved of FCC regulatory authority of only the narrowest scope:

> On its face, [the Commission's holding] does not prevent [the broadcaster] from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the

> contemporary use of language at any time of the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast, as distinguished from the *verbal shock treatment* administered by respondent here.

Pacifica, 438 U.S. at 759-60, 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added). Justice Powell's opinion, then, makes clear what *Pacifica* did not sanction: *Pacifica* allowed the Commission to regulate the "verbal shock treatment" administered by the Carlin monologue but did not sanction suppression of other categories of speech (including "isolated" offensive words) described by Justice Powell. Indeed, protection of indecent speech is the background rule against which *Pacifica* operated and in light of which the Court carved out an exceedingly narrow exception. *See, e.g., Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[E]xpression which is indecent but not obscene is protected by the First Amendment . . . ."); *Carey v. Population Services, Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

That *Pacifica* demonstrates that the First Amendment does not tolerate a finding of indecency or profanity in this instance is further bolstered by Justice Brennan's opinion:

> Having insis[illegible] that it seeks to impose sanctions on [illegible]dio communications only in the limited circumstances present here, I believe that the FCC is estopped from using either this decision or its own orders in this case, 56 F.C.C.2d 94 (1975) and 59 F.C.C.2d 892 (1976), as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the *relentless repetition, for longer than a brief interval,* of "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." 56 F.C.C.2d, at 98. *For surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of "verbal shock treatment" condemned here,* or even this "shock treatment" type of offensive broadcast during the late evening.

Pacifica, 438 U.S. at 772 n.7 (Brennan, J., dissenting) (emphases added). Indeed, Justice Brennan concluded that the Commission lacks *all* authority to regulate supposedly indecent (as opposed to obscene) material, because indecent speech is fully protected by the First Amendment. *See id.* at 771 (Brennan, J., dissenting) (noting that plurality and concurring opinions "do no more than permit the Commission to censor the afternoon broadcast of the 'sort of verbal shock treatment' . . . involved here" but otherwise seek to

"insure that the FCC's regulation of *protected speech* does not exceed these bounds" (emphasis added)).

It is impossible to equate the pre-recorded 12-minute Carlin monologue in *Pacifica*—a "verbal shock treatment" "repeated over and over," *id.* at 757 (Powell, J., concurring in part and concurring in the judgment)—with the momentary, fleeting, and isolated broadcast of even the "F-word" in the middle of a live two-hour television awards show broadcast in the evening. This Court's narrowly-circumscribed approval of the Commission's proscription of the Carlin monologue in *Pacifica* does not countenance the Commission's new policy with respect to an isolated, non-repeated expletive.

III. The Court Can Fully Resolve This Case Under the APA and *Pacifica*

The Court need go no further than *Pacifica* to determine that the Commission's new indecency enforcement policy cannot withstand scrutiny under the APA. *See Kremens v. Bartley*, 431 U.S. 119, 136 (1977) (stating that the "Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (internal quotation marks and citation omitted)); *Washington State Grange v. Washington State Republican Party*, --- U.S. ---, 128 S. Ct. 1184, 1191 (2008) (same); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985) (same; applying rule in First Amendment context). *Pacifica* makes plain that the FCC's authority to regulate indecency is circumscribed by the protections afforded by the Constitution, and *Pacifica* does not sanction the Commission's new policy

penalizing the broadcast of a momentary and unrepeated expletive. Those settled principles, without more, determine that the Commission's new fleeting expletives policy is "contrary to constitutional right," "not in accordance with law," and thus invalid under the APA. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (stating that the Court will decide a case on the narrower ground of adjudication if there are constitutional questions involved); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 847 (1977) (declining to resolve question whether constitutionally protected liberty interest was implicated by state procedures governing removal of foster children from foster homes because the case could be resolved on "narrower ground[]" that preremoval procedures employed by state were constitutionally adequate).

This case may—and, indeed, should—be decided under the APA and *Pacifica*. Consequently, the Court need not revisit its rationale supporting the "special treatment" given the regulation of broadcast indecency, *see Pacifica*, 438 U.S. at 748-50; *see also id.* at 757-60 (Powell, J., concurring in part and concurring in the judgment), or revisit the Congressionally-mandated public trustee regulatory framework for broadcast media approved in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), as some parties, *see, e.g.*, Brief of Respondents NBC Universal, Inc. et al. at 31-38, have suggested. *See generally Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (stating that the "Court will not anticipate a question of constitutional law in advance of the necessity of deciding it" (internal quotation marks and citation omitted)).

While there has been, as some parties have observed, an increase in recent years in the number of broadcast stations and in audio and video distribution technologies, the laws of physics have not changed. It is still not possible for more than one entity to operate, without destructive interference, at the same time on a specific broadcast channel in the same local area. Moreover, the "uniquely pervasive" and "scarcity" issues now raised by these parties are not fairly included in the question presented to the Court for which certiorari has been granted. *See* S. Ct. Rule 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992) (explaining prudential rule that Court will not consider an issue even related to or complementary to the question presented where the issue is not "fairly included in" or is not necessary in resolving the question presented to the Court). Consistent with its long-established prudential principles, the Court should not reach out to address constitutional issues that are not necessary to the resolution of this case.

Conclusion

For the foregoing reasons, the judgment of the court of appeals that the FCC's new broadcast indecency enforcement regime is invalid under the APA should be affirmed.

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AMICUS CURIAE BRIEF

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FOX TELEVISION STATIONS, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTEREST OF *AMICI* IN THIS CASE[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties, sanctity of life, and family values. ADF and its allied organizations represent hundreds of thousands of Americans who object to the eroding standards of decency in our society. Its allies include more than 1,000 lawyers and numerous public interest law firms. ADF has advocated for the rights of Americans to maintain standards of decency and exercise their religious beliefs in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 such cases and legal matters, including cases before this Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Troxel v. Granville*, 530 U.S. 57 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National*

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Endowment for the Arts v. Finley, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksgerg*, 521 U.S. 702 (1997).

FAMILY RESEARCH COUNSEL ("FRC") is a non-profit organization located in Washington, D.C. It exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal.

SUMMARY OF ARGUMENT

Amici contend that there exists a societal interest in maintaining standards of decency. This interest extends to the preservation of standards of decency with respect to the materials broadcast into our nation's homes. Seventy-five years ago, in recognition of this interest, Congress created the Federal Communications Commission ("FCC") and imbued that agency with authority to interpret and enforce broadcast decency standards on the public airwaves.

Over the past 40 years, courts (in the name of preserving individual freedoms) have ignored this societal interest, causing an ever-eroding and ever-devolving set of standards by which we now conduct ourselves as a society. That erosion of standards has led to an ever-increasing willingness and boldness on the part of the nation's broadcast

licensees to include indecent material within their programming. Moreover, it has brought us to this point – where any FCC regulation of indecency is being challenged as invalid, as is the FCC's continued relevance for enforcing decency standards at all.

Amici contend that it is time to once again consider the very real societal interests in maintaining standards of decency, in conjunction with individual freedom of speech rights. The FCC's revised guidance with respect to what constitutes indecency does exactly this. Further, it more logically follows the very type of context-based analysis endorsed by this Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court of Appeals' decision to vacate both the FCC's policy and the FCC's decisions regarding the broadcasts at issue is tainted both by that court's failure to accord proper deference to the FCC and by that court's failure to acknowledge societal interests in maintaining standards of decency. Accordingly, the court's decision should be reversed.

ARGUMENT

I. THE FCC'S ACTION RECOGNIZED THE STRONG AND HISTORICALLY-PROTECTED SOCIETAL INTEREST IN PROMOTING PUBLIC DECENCY.

A. Historically, Public Decency Was Recognized and Protected as an Important Societal Value.

From the founding of this nation until relatively recent times, American courts balanced individual freedom of speech rights against society's interest in moral order. Indeed, the Founders considered the protection and advancement of morality to be a fundamental justification for protecting the freedoms of speech and press. First Continental Congress, Appeal to the Inhabitants of Quebec, 1774, quoted in THE HERITAGE GUIDE TO THE CONSTITUTION 311-12 (Edwin Meese III, *et al.*, eds., Washington, DC: Regnery Publishing, 2005). Free speech was not unlimited. It was to be protected to the extent that it furthered the search for truth and an increase in virtue among citizens and their officials. *Id.* at 312.

In the early history of the Republic, our nation's courts consistently recognized the importance of protecting the virtue of society in general and the young in particular:

> Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful...and shall we form an exception in these particulars to the rest of the civilized world?

People v. Ruggles, 8 Johns 545, 546 (Sup. Ct. N.Y. 1811). In a similar vein, the Pennsylvania Supreme Court wrote:

> The destruction of morality renders the power of the government invalid... The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences... No man is permitted to corrupt *the morals of the people.*

Commonwealth v. Sharpless, 2 Serg. & R. 91, 103, 104 (Sup. Ct. Pa. 1815) (emphasis added).

Likewise, this Court noted that, because the fundamental purpose of the free speech guarantee was to foster the attainment of truth and public virtue, many forms of expression were simply outside the scope of First Amendment protection.

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and *are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (citations omitted; emphasis added).

This Court traditionally applied the First Amendment's freedom of speech guarantee in a way that fostered the explication of ideas. Expressions that did not make a constructive contribution to the exposition of ideas – such as expletives, blasphemy or fighting words – were simply not entitled to First Amendment protection. Accordingly, as recently as 1957, Supreme Court decisions followed this long-established view that

indecency was not condoned under the guise of free speech:

> The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel and all of those States made either blasphemy or profanity, or both, statutory crimes.

Roth v. United States, 354 U.S. 476, 481-82 (1957) (citations omitted). The First Amendment safeguarded freedom of speech to the extent necessary to assure society's interest in the interchange of ideas. *Id.* at 484. Thus, as of 1957, this Court continued to apply the First Amendment in a way that protected public morality as well as the free expression of socially worthwhile ideas. Protection of public decency remained a viable rationale for legislative action.[2]

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[2] While it is true that *Roth* was decided in the context of an obscenity charge, the underlying concepts pertaining to the protection of public decency as a viable governmental interest apply equally to the use of all language, whether categorized as obscene, indecent, or profane.

Justice Harlan, concurring in part in *Roth*, emphasized the right of a state legislature to protect public morality:

> It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the *moral fabric* of society.... The State can reasonably draw the inference that over a long period of time, the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on *moral standards*. And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.

Id. at 502 (Harlan, concurring in part and dissenting in part; emphasis added). As of the time of this Court's decision in *Roth*, the existing jurisprudence not only upheld notions of public morality, but allowed individual States the flexibility to determine their own moral standards.

B. Some Court Decisions Have Elevated the Individual Interest in Free Expression Above the Societal Interest in Public Decency.

The States' power to set and preserve moral standards began to diminish with *Jacobellis v. Ohio*, 378 U.S. 184 (1964), in which the Court, by a 6-3 vote, determined that a national obscenity standard should apply. *Jacobellis* also held that obscenity was a question of law for the courts to decide, so that deference to the findings of state juries and legislatures was inappropriate. *Id.* at 194-95. *Jacobellis* also turned the obscenity focus away from what was perceived to be good for the social moral order as a whole and toward only a perceived harm to children instead. *Id.* at 195. *Jacobellis* tended to reduce the protection of public decency by removing local control and focusing on the effect of pornography upon recipients (such as children) as opposed to the effect on public decency in general.

Dissenting in *Jacobellis*, Chief Justice Warren viewed the task of the Court as "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely...." *Id.* at 199. The Chief Justice acknowledged "society's right to maintain its moral fiber." *Id.* at 202. He believed the reconciliation of interests would best be served by the application of local community standards. *Id.* at 202-03.

The moral conscience of the community, formerly critical to the Court's construction of the First Amendment, continued to fade from prominence. In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court reversed field on the importance of social value in the definition of obscenity. Previously, lewd and obscene materials were not considered to be within the First Amendment's protection precisely because they were "of such slight social value as a step to truth...." *Roth*, 354 U.S. at 485. But in *Memoirs*, the Court adopted the converse proposition, to wit, that if an otherwise obscene communication contained any material of redeeming social value, then it could not be banned without violating the First Amendment. *Memoirs vs. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion). After *Memoirs*, pornographers immunized their movies and books against obscenity convictions by injecting small amounts of material that might be deemed to have "redeeming social value." Through this contrivance, publishers of indecent material artificially cloaked themselves with First Amendment protection.

In the late 1960s, the Court handed down dozens of decisions that "elevated pornography and other assaults on decency to the level of a First Amendment right. The Supreme Court reversed dozens of judges, juries, and appellate courts in sixteen states, made laws against obscenity

unenforceable, and lowered drastically the standards of decency in communities throughout America." Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 95, 97 (2008). Many of these decisions were issued *per curiam*, without any recitation of the pornographic material being granted First Amendment protection, and simply citing *Redrup v. New York*, 386 U.S. 767 (1967) (*per curiam*), as their sole justification. At least 27 Supreme Court pornography decisions were issued anonymously during this period, "suggest[ing] that the Justices could not defend the obscenity that they used the First Amendment to protect." Schlafly, *supra*, at 99.

While adopting an "anything goes" approach for pornography sold to adults, the Court applied a more stringent standard for material being sold to minors. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a conviction under a New York criminal obscenity statute that prohibited the sale of obscene material to minors under 17 years of age. In doing so, the Court determined that the "girlie" magazines were not obscene for adult viewers, citing *Redrup v. New York*. Nevertheless, the Court held the conviction proper because the magazines were being sold to children under 17. The Court recognized that the state legislature could reasonably find that minors' exposure to such

material might be harmful. *Ginsberg,* 390 U.S. at 639.

Ironically, the *Ginsberg* decision tended to weaken, rather than strengthen, legislative efforts to protect decency. Just as the "redeeming social value" test was turned on its head to expand First Amendment protection of pornography, the "danger to children" test tended to open the floodgates to pornography aimed at adults. In both cases, the Court's rationale tended to broaden the protection of indecent material and to reject the preservation of public decency as a legitimate legislative interest.

The motion picture industry responded overnight to the new treatment of pornography. "The results of the Academy Awards reflected this abrupt change. In 1965, the Best Picture was *The Sound of Music*; in 1969, the Best Picture was *Midnight Cowboy*, an X-rated film about a homeless male hustler. This new freedom brought obscene language, near-total nudity, graphic sex scenes, and sadistic violence to neighborhood movie theatres." Schlafly, *supra,* at 99-100 (footnote omitted).

The cause of public decency suffered a further setback in *Cohen v. California*, 403 U.S. 15 (1971), a case that "threw First Amendment protection around a man who wore into a courthouse a jacket suggesting, with a short Anglo-Saxon verb, that the

reader perform a sexual act of extreme anatomical implausibility with the Selective Service System." ROBERT H. BORK, COERCING VIRTUE 61-62 (Washington, DC: AEI Press, 2003). Although the jacket was undeniably offensive and was being worn in a public place where women and children were present, the Court, by a 5-4 vote, found that California's effort to excise this scurrilous epithet was unconstitutional. The Court rationalized its decision by saying that people in the courthouse could simply avert their eyes.[3] *Cohen*, 403 U.S. at 21. The Court emphasized the importance of freedom of speech:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be

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[3] This recommendation to "simply avert one's eyes" is similar to what parents are being told today – "simply turn it off", or "simply employ the available V-chip technology." Unfortunately, it's never that simple, as neither one of these instructions would have prevented children, or their parents for that matter, from witnessing the infamous "wardrobe malfunction" during the otherwise G-rated national championship game of one of America's favorite pastimes, nor would it have prevented families from hearing the expletives used by Cher and Nicole Ritchie that form the basis of this present action.

> voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. at 24 (citation omitted). The Court failed to explain, however, how the language used in that case would help produce a more capable citizenry, a more perfect polity, or comport with human dignity.

The five justices forming the slight majority in *Cohen* chose not to distinguish between the vulgar word at issue and words that might acceptably be used to further public discourse. "For while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." *Id.* at 25. Thus did the Court adopt a moral relativism standard, a sense of an individualistic "anything goes" without regard to society's larger interests, into First Amendment jurisprudence. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 99 (New York: ReganBooks, 1997).

Miller v. California, 413 U.S. 15 (1973), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973),

attempted to slow the growth of pornography. In *Miller*, the Court overruled the *Memoirs* test that to sustain a conviction for obscenity, a prosecutor must prove that the material in question is "utterly without redeeming social value." *Miller*, 413 U.S. at 21. The Court attempted to restore the presumption that obscene material lacked redeeming social value. "It was nearly impossible, however, to turn back the tide of pornography; the damage was already done and continues to this day." Schlafly, *supra,* at 101.

In *Paris Adult Theatre*, 413 U.S. 49 (1973), the Court attempted to reaffirm the lost emphasis on general decency as a valid legislative concern:

> In particular, we hold that there are legitimate State interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby.... *[The public has an interest] in the quality of life and the total community environment...*

Id., 413 U.S. at 57-58 (citations omitted; emphasis added). The prior decade of focusing solely on individual rights, however, had done its damage.

C. The Elevation of the Individual's Interest in Free Expression Above the Societal Interest in Decency Has Led to the Coarsening of Society.

By failing to distinguish between offensive vulgarities and those expressions that truly contribute to the exposition of ideas, "the Court, without any authority in the Constitution or any law, has forced Americans to adopt the Court's view of morality rather than their own." BORK, GOMORRAH, *supra*, at 114. As such, the Court itself, in its "solicitude for aberrant individuals," has infringed upon the right of society at large to maintain the majority's notions of decency. BORK, GOMORRAH, *supra*, at 105. This is what the late Senator Daniel Patrick Moynihan called "defining deviancy down." Daniel Patrick Moynihan, *Defining Deviancy Down*, THE AMERICAN SCHOLAR 17 (Winter 1993), cited in BORK, GOMORRAH, *supra*, at 3. Judge Bork describes the cultural decline as follows:

> With each new evidence of deterioration, we lament for a moment, and then become accustomed to it. We hear one day of the latest rap song calling for killing policemen or the sexual mutilation of women;... then of the latest homicide figures for New York City, Los Angeles, or the District of Columbia; of the collapse of

> the criminal justice system...; of the rising rate of illegitimate births; the uninhibited display of sexuality and the popularization of violence in our entertainment; worsening racial tensions; ... – the list could be extended almost indefinitely.
>
> So unrelenting is the assault on our sensibilities that many of us grow numb, finding resignation to be the rational, adaptive response to an environment that is increasingly polluted and apparently beyond our control.

BORK, GOMORRAH, *supra*, at 2-3.

Judge Bork contrasted the lyrics of the 1930s hit "The Way You Look Tonight" with the Snoop Doggy Dogg rap song, "Horny," to illustrate the collapse of American popular culture. BORK, GOMORRAH, *supra*, at 124. He described modern American culture as one that no longer possesses the disciplinary tools of shame and stigma to restrain the most primitive human emotions. BORK, GOMORRAH, *supra*, at 125. It is not surprising that the cultural decline has spread to television.

> Television, not surprisingly, displays the same traits as the movies and music... Language is increasingly

> vulgar.... Recreational sex...is pervasive and is presented as acceptable about six times as often as it is rejected... Television takes a neutral attitude toward adultery, prostitution and pornography. It 'warns against the dangers of imposing the majority's restrictive sexual morality on these practices. The villains in TV's moralist plays are not deviants and libertines but Puritans and prudes.' The moral relativism of the Sixties is now television's public morality.

BORK, GOMORRAH, *supra*, at 127 (citation omitted).

While the Court was expanding First Amendment protection for pornography and other vulgar expressions, it was restricting First Amendment protections for religious expressions. *Engel v. Vitale*, 370 U.S. 421 (1962) (forbidding voluntary, non-denominational school prayer); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (forbidding voluntary Bible reading to open the school day); *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting posters of the Ten Commandments in schools); and *Wallace v. Jaffree*, 472 U.S. 38 (1984) (forbidding a voluntary one-minute period of silence in school). As the Court adopted a more expansive view of the so-called "wall of separation between church and state," its

willingness to apply traditional moral values under the Free Speech clause diminished. This, in turn, led to some surprising outcomes. For example, because the Court's rationale in forbidding child pornography was now only to protect child victims and not to vindicate any societal moral interest, virtual (simulated) child pornography has come to be protected as free speech. *See U.S. v. Williams*, 553 U.S. ___ (2008); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-51 (2002).

Have the Court's decisions on pornography and other decency issues had any effect on our society? Government data suggests that they have. The birthrate among unwed girls ages 15-19 ranged from 13 to 16 per thousand in the period 1951-63. From 1963 to 1993, the rate soared from approximately 15 per thousand to 45 per thousand. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STATISTICAL ABSTRACT OF THE UNITED STATES, cited in DAVID BARTON, ORIGINAL INTENT 242 (Aledo, TX: WallBuilder Press, 2000). The birthrate among unwed girls ages 15-19 peaked at almost 60 per thousand in 1990. STATISTICAL ABSTRACT OF THE UNITED STATES, http://www.census.gov/compendia/statab/tables/08s0083.xls

Incidence of gonorrhea in the 10-14 age group was below 18 cases per 100,000 population from 1956 to 1963. From 1963 to 1993, it increased dramatically, reaching 70 cases per 100,000 in

1990. U.S. CENTER FOR DISEASE CONTROL AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, cited in BARTON, ORIGINAL INTENT, *supra,* at 244.

Likewise, family stability as measured by two-parent households decreased. During the period 1950-1963, single parent households in the United States were fewer than 5 million. By 1994, this number exceeded 12 million. STATISTICAL ABSTRACT OF THE UNITED STATES, DEPARTMENT OF COMMERCE CENSUS BUREAU, cited in BARTON, ORIGINAL INTENT, *supra,* at 246. By 2006 the United States had over 19 million single parent households, 14 million headed by unmarried women. http://www.census.gov/compendia/statab/tables/08s0058.xls. These are a few among many indicators that as the Court increased Constitutional protection for individual expression without regard to societal interests in preserving and protecting decency, negative consequences followed.

D. This Court Should Support the FCC's Effort to Protect the Societal Value of Public Decency.

It is against this background that Amici respectfully submit that it is well past time that the Court reconsiders the reasoning behind its prior rulings in the area of public decency. By giving First Amendment priority to purveyors of pornography and indecent speech, the Court has,

perhaps unwittingly, condoned a coarsening of our society. This obviously affects not only American children – middle school assignments often include books containing sex, immoral behavior and profanity, Schlafly, *supra,* at 102 – but society as a whole. It is not only children who are debased by an environment of indecency and immorality. How loudly Justice Harlan's prediction of 50 years ago now rings in our ears: "over a long period of time, the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." *Roth v. United States*, 354 U.S. at 502 (Harlan, J., concurring in part and dissenting in part). How much louder must we allow the din and clamor to become before acknowledging the error of eliminating the societal interest of preserving and protecting decency from freedom of speech jurisprudence?

The FCC's challenged action is only a small step in the direction of restoring moral decency in modern American culture, but it is one that must be taken and that must be allowed to be taken. The FCC only attempts to regulate indecent broadcasts between the hours of 6 a.m. and 10 p.m. Even fleeting vulgarities contribute to the coarsening of our culture. To the extent the FCC has determined that even a fleeting expletive constituted a harmful blow to public decency, its finding should be sustained.

It is absurd to argue that society cannot legislate morality. In fact, all legislation is an expression of a society's morality. By striking down so many legislative pronouncements designed to support public morality, this Court "has dictated *immorality* through First Amendment jurisprudence." Schlafly, *supra,* at 95.

By expanding protection of pornography and other vulgarities while restricting public religious expression, this Court has had a profound effect on what one scholar has termed our "moral ecology." ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (Oxford Univ. Press, 1994). The Founders considered public morality indispensable to the maintenance of a free society. As President John Adams stated:

> [W]e have no government armed with power capable of contending with human passions undebridled by morality and religion.... Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.

JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 229 (Charles Frances Adams, ed., Boston: Little, Brown and Company, 1854), Vol. IX, cited in BARTON, ORIGINAL INTENT, *supra,* at 319. In a similar vein,

Benjamin Franklin said, "[o]nly a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters." BENJAMIN FRANKLIN, THE WORKS OF BENJAMIN FRANKLIN 297 (Jared Sparks, ed., Boston: Tappan, Whittimore and Mason, 1840), Vol. X, cited in BARTON, ORIGINAL INTENT, *supra,* at 321. The wisdom of our Founders and the cultural decline of the last fifty years suggest that the societal interest in decency and virtue is worthy of legal protection. To the extent the challenged FCC decision is an effort to support and enforce decency standards, the public interest demands that it be sustained.

II. THE COURT OF APPEALS IMPROPERLY INTERFERED WITH THE FCC'S DUTY TO PROTECT PUBLIC DECENCY.

A. Congress and this Court Have Recognized the FCC's Duty to Protect Public Decency.

In the Radio Act of 1927, the United States Congress first enacted a statute prohibiting the uttering of "any obscene, indecent, or profane language by means of radio communication." (Currently codified at 18 U.S.C. § 1464). Seven years later, Congress passed the Communications Act of 1934 (the "Act"), 47 U.S.C. §§ 151-614, to provide for the regulation of interstate and foreign communication by wire or radio. The initial section of the Act created the FCC, recognizing the FCC as the authority charged "to execute and enforce the

provisions of the Act." 47 U.S.C. §151. To allow the FCC to carry out that charge, Congress armed the FCC with several enforcement tools, including the power to revoke a station license for violating the prohibition against broadcasting obscene or indecent language. *See* 47 U.S.C. § 312(a)(6), as well as the power to order licensees to cease and desist from violations of that same prohibition, *see* 47 U.S.C. § 312(b).

Moreover, Congress empowered the FCC to "make such rules and regulations...as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Pursuant to this grant of authority, the FCC has promulgated rules, including one that states that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent," 47 C.F.R. § 73.3999(b)[4], and another which vests the FCC with the responsibility of "[resolving] complaints regarding compliance with statutory and regulatory provisions regarding

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[4] Congress expressly directed the FCC to take steps to determine the appropriateness of, and to promulgate regulations pertaining to, the broadcasting of indecent television or radio programming between the hours of 6AM and 10PM. *See* §16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992). The FCC's promulgated rule was ultimately upheld. *See Action for Children's Television v. FCC*, 58 F.3d 654, 669-670 (D.C.Cir.1995), *cert. denied*, 516 U.S. 1043 (1996).

indecent communications." 47 C.F.R. § 0.111(a)(7). Indecent communication is defined as language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.[5] *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 (Mar. 14, 2001).

While granting broad authority to the FCC, the Act does provide certain limitations to the FCC's authority, stating that the FCC has no "power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. However, this Court has determined that this section does not limit the FCC's authority to impose sanctions on licensees who engage in indecent or profane broadcasting. *FCC v. Pacifica Foundation*, 438 U.S. 726, 738 (1978)(respect for Congress' intent "requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent, or profane language.")

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[5] Indecent programming contains patently offensive sexual or excretory material that does not rise to the level of obscenity.

Notwithstanding the above, it is clear that the FCC has historically endeavored to consider and achieve a proper balance between (a) its Congressionally-mandated charge to enforce our nation's broadcast indecency statutes and (b) concerns of inappropriate and overly broad regulation. The Court of Appeals now seeks to upset that proper balance, effectively determining that there is no longer a need for the FCC to fulfill a charge to enforce indecency statutes.

For the past 30 years, the FCC has been guided in its efforts by this Court's pronouncements in the *Pacifica Foundation* case, 438 U.S. at 726 (1978). *Pacifica* emphasized that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* at 748. Among the reasons given by the Court for this more limited protection are the uniquely pervasive presence that medium of expression occupies in the lives of all Americans, *id.* at 748-49, and the unique accessibility of broadcasting to children, even if too young to read, *id.* at 749-50.

Most importantly, the Court in *Pacifica* emphasized that the "specific factual context" is key to judging whether language is indecent. *Id.* at 742. The Court stated:

> [T]he constitutional protection accorded to a communication containing such patently offensive sexual and

excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy's term,[6] vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity. In this case, it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.

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[6] The *Pacifica* Court earlier included, with approval, a quote from Justice Murphy's opinion in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), specifically: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Pacifica*, 438 U.S. at 746. Justice Murphy's comments are clearly *apropos* to the current facts before this Court, and Family Research Council wholeheartedly endorses Justice Murphy's sentiment and conclusions.

Pacifica, 438 U.S. at 747-48 (citations and footnotes in original omitted).

The Court further stated:

> The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

Pacifica, 438 U.S. at 750.

Clearly, in evaluating a potential indecency violation, the FCC must consider a variety of factors, in which context is central. Each of the factors mentioned by the *Pacifica* Court (i.e., context of statement, time of day, composition of audience, etc.) are considerations for the FCC in its role as the Congressionally-mandated agency with the responsibility to oversee broadcast indecency. And, in fact, the FCC did review such factors in determining that the language used in these two instances constituted indecency: (1) the time of day – prior to 10 p.m. when millions of children would

be in the audience; (2) the program content – an awards ceremony where it could be anticipated that the home viewing audience would include unsuspecting families with their children; (3) the shocking use and surprise of such language on a major network during primetime; (4) the clear intent on the part of at least one of the speakers (*i.e.,* Nicole Richie) to depart from the script for the express purpose of shocking the audience by uttering the offensive words; and (5) the considerable complaints that followed. Each of these factors was recognized by the *Pacifica* Court as bearing upon the ultimate determination of whether the words spoken constituted indecent language, and supports the FCC's decision. The Court of Appeals' difference of opinion should neither be permitted to usurp the FCC's reasoned decision and authority, nor should it prevent the FCC from carrying out its Congressionally mandated responsibility.

B. The Second Circuit Improperly Substituted its Judgment for the Reasonable Judgment of the FCC.

In authorizing the FCC to regulate the communications industry, Congress provided broad discretionary power to the FCC to establish, change, and enforce its rules and policies. Thus, an agency's decision will be upheld by a court unless found to be "arbitrary, capricious, or an abuse of discretion." *See* 5 U.S.C. § 706(2)(A). The scope of

review under the arbitrary and capricious standard is narrow and a court is not allowed to substitute its judgment for that of the agency. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) ("*Motor Vehicle Manufacturers*"). The court must further "consider whether a decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*. An agency, on the other hand, must examine relevant information and provide a reasonable explanation, which includes a rational connection between the facts found and the choice made." *Id.* . Nevertheless, a reviewing court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* [7]

With respect to policy changes, an agency must both acknowledge and explain policy changes. *Motor Vehicle Manufacturers* at 41-44 (agency

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[7] *See also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)(a court may not substitute its own opinion as to the policy to be employed, but is limited to determination of whether the agency's promulgated policy is a reasonable one.) *See also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(a court must not "substitute its judgment for that of the agency"); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("Administrative decisions should [not] be set aside ... because the court is unhappy with the result reached.").

required to provide a reasoned analysis for the change).[8] As stated by the *Chevron* Court, "[a]n initial agency decision is not carved in stone" and an agency is free to revise its rules and policies but must provide a reasoned analysis for departing from the prior precedent. *Chevron, U.S.A., Inc.* 467 U.S. at 863. The Court specifically stated that:

> [W]hen an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act. . . Although there is not a "heightened standard of scrutiny ...*the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.*" Even in the absence of cumulative experience, changed circumstances or judicial criticism, an agency is free to change course after reweighing the competing statutory policies. But such a flip-flop

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[8] *See also AT&T v. FCC*, 974 F.2d 1351 (D.C.Cir.1992)(agency must acknowledge a change in policy); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)(agency must provide reasoned analysis that prior policies and standards are being deliberately changed, not casually ignored).

> must be accompanied by a reasoned explanation of why the new rule effectuates the statute *as well as or better than the old rule.*

Id. (emphasis added)

In this case, the FCC, in response to specific complaints by the viewing public, determined that the Billboard Music Awards broadcasts had violated FCC rules on indecent language. It further provided a very detailed and reasoned explanation for this decision as well as for its revised policy on expletives, consistent with the APA, 5 U.S.C. § 706(2)(A).[9] In its review of the FCC's determinations, the Court of Appeals ignored the deferential standard of review it was supposed to follow, and instead thrust itself into the decision-making role of the FCC. In holding that the FCC did not *adequately* explain the reasons for its change of policy on "fleeting expletives," the Court

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[9] It is arguable whether any significant change in policy actually occurred. The FCC's "fleeting expletive" rule continued to consider the *context* of any broadcast alleging indecent material or language, with the number of uses of the offending language one of the factors to be considered. In his dissenting opinion, Circuit Judge Leval identified the FCC's decision to accord a lesser weight to one of the context factors (*i.e.*, whether the offending language is repeated) as a "relatively modest change of standard." *Fox Television Stations, Inc. v. Federal Communication Commission*, 489 F.3d 444, 468 (2008) ("*Fox v. FCC*").

of Appeals completely disregarded the FCC's clearly enunciated reasons. See Remand Order at ¶¶ 11-66; FCC Petition at 13-30. Certainly, the Court of Appeals *point-by-point* rebuttal of each of the FCC's reasons for its revised policy belies the court's contention that the FCC failed to provide a reasoned explanation. While the Court of Appeals is entitled to review the relevant record in considering whether the FCC's actions are arbitrary and capricious, 5 U.S.C. § 706, it is not permitted to substitute its own reasoning and analysis for that of the FCC. Rather, the Court of Appeals was required to restrict its analysis to whether the FCC had a reasoned analysis for the decision, comprising a permissible construction of the statute, as intended by Congress. *See Chevron*, 467 U.S. at 843 ("the question for the [reviewing] court is whether the agency's answer is based on a permissible construction of the statute.")

The FCC's decision to prospectively make its determinations of what constitutes indecent language by looking at the totality of circumstances rather than merely the number of times an expletive is uttered is certainly a reasonable and rational approach to the Congressional mandate to enforce the indecency statutes. Even the *Pacifica* opinion, which the Court of Appeals holds up again and again in its ruling as a model of how to proceed cautiously in this area, suggests that it would be reasonable, *in the proper context*, to find a single

utterance of an expletive to be indecent language. *See Pacifica,* 438 U.S. at 748-49 ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.") Returning to the context-based determination suggested by the *Pacifica* Court hardly seems arbitrary and capricious, especially when the appropriate standard of review requires a reviewing court to give deference to an agency decision.

Indeed, the FCC provided a detailed explanation demonstrating why its "change" in policy is consistent with the context-based approach in *Pacifica* and why context-based distinctions regarding indecent language, whether fleeting or otherwise, is more rational than a policy that would sanction – or not sanction – indecent language regardless of the context. FCC Petition at 15-19. Such a policy actually demonstrates restraint on the part of the FCC and a healthy respect for free speech principles, notwithstanding the FCC's obligation to pursue complaints of broadcast indecency. In addition, the FCC also explained why a non-repetitive use of certain expletives would no longer result in a virtual free pass. *Remand Order* at 29a. Certainly, by any objective standard, the FCC provided a reasoned explanation for its purported change of policy on "fleeting expletives."

As a result, under the proper standard of review, the Court of Appeals should have deferred to and upheld the FCC's judgment on how best to enforce its broadcast indecency rules. Instead, it improperly disregarded the FCC's reasonable analysis and inserted its own. Accordingly, the Court of Appeals judgment should be reversed.

CONCLUSION

Amici Alliance Defense Fund and Family Research Council respectfully request that this Court reverse the judgment of the Court of Appeals, and remand the case to that court for further proceedings.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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NO. 07-582

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN ACADEMY OF PEDIATRICS, BENTON FOUNDATION, CHILDREN NOW, NATIONAL INSTITUTE ON MEDIA AND THE FAMILY, PARENT TEACHER ASSOCIATION, AND UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATIONS, INC., IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI*

Amici are non-profit organizations that share a strong interest in ensuring that broadcast television fulfills its potential of providing educational programming to children and that children are not exposed to programming that is not appropriate for them.[1]

Amicus the American Academy of Pediatrics ("AAP") is an organization of 60,000 primary care pediatricians, pediatric medical subspecialists and pediatric surgical specialists dedicated to the health, safety and well-being of infants, children, adolescents and young adults.

The mission of *amicus* the Benton Foundation is to articulate a public interest vision for the digital age and to demonstrate the value of communications for solving social problems. The Foundation is a long-time advocate of defining the public interest obligations of digital broadcasters.

Amicus Children Now is a national organization for people who care about children and want to ensure that they are the top public policy priority. Its Children & the Media Program works to provide a healthy media environment for all children.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amicus the National Institute on Media and the Family ("NIMF") is a non-profit, non-denominational and non-partisan organization with the mission to maximize the benefits and minimize the harm that media have on children's health and development through research and education. NIMF believes that it is in the interest of parents, children and the general public to uphold the public interest obligations of broadcasters.

Amicus the Parent Teacher Association ("PTA"), a non-profit organization, is the largest volunteer child advocacy organization in the United States. PTA comprises more than 5 million members in 25,000 local, council, district, and state PTAs in the 50 states, the District of Columbia, the U.S. Virgin Islands, and Department of Defense Dependents Schools overseas. Founded in 1897, PTA's mission is to support and speak on behalf of children and youth in the schools, in the community and before governmental bodies and other organizations that make decisions affecting children. PTA has supported numerous legislative and regulatory initiatives, court cases and media industry campaigns supporting the care and protection of children. PTA is committed to educating families, especially parents, caregivers, and children, to be successful and knowledgeable media consumers.

Amicus the United Church of Christ, Office of Communications, Inc. ("UCC OC, Inc."), is the media justice arm of the United Church of Christ ("UCC"). UCC is a faith community rooted in justice with 5,700 local congregations across the United States. It was formed by the 1957 union of the

Congregational Christian Churches and the Evangelical and Reformed Church. UCC OC, Inc. has long recognized the unique power of the media to shape public understanding and thus society. For this reason, UCC OC, Inc. works to create just and equitable media structures that give meaningful voice to diverse peoples, cultures and ideas.

SUMMARY OF ARGUMENT

This Court granted certiorari in this case to address whether the court of appeals erred in striking down the FCC's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. § 1464; *see* 47 C.F.R. § 73.3999, when the expletives are isolated, or "fleeting," and not repeated.

Amici file this brief in support of neither side, but to advise the Court as to the concerns of the children's media policy community and to share our knowledge of certain facts that may be relevant in this case.

Of great importance to *Amici* is that, whatever the outcome in this case, the Court continues to recognize the constitutional legitimacy of the FCC's statutory public interest oversight of television broadcasters. The Court need not, and should not, revisit *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), to address the narrow issue before it. *Amici*, as organizations committed to upholding the public interest obligations of broadcasters, especially as they apply to promoting mentally healthy children and families, have an interest in upholding the

stability and predictability of these established aspects of broadcast media law.

Amici are particularly concerned because the court of appeals stated, albeit in *dicta*, that "technological advances may obviate the constitutional legitimacy of the FCC's robust oversight." *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 466 (2d Cir. 2007). Accordingly, *Amici*'s brief also corrects the apparent misimpression by the court of appeals regarding the ability of "technological advances" to displace the FCC's public interest oversight function in broadcast television. The V-Chip and its companion program ratings system, despite their ostensible promise, have not been designed or implemented in a way to address successfully the challenge of protecting children from viewing material their parents feel is inappropriate on broadcast television.

ARGUMENT

I. THE COURT NEED NOT AND SHOULD NOT RECONSIDER *RED LION*.

Amici urge the Court to decide this case based on whether the court of appeals correctly held that the FCC's determination violated the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* ("APA"), and not, as one respondent has suggested, on the broader constitutional issues that the court of appeals discussed in *dicta*. *See, e.g.*, Brief in Opposition of NBC Universal Inc. and NBC Telemundo License Co. at 32 n.9 (arguing that to the extent the FCC argues that the scarcity rationale dictates a more permissive standard of review for regulating broadcast speech, the Court may need to reconsider its decision in *Red*

Lion). Accepting respondent's invitation to reconsider *Red Lion* is not only unnecessary, but could have the unintended consequence of harming children by undermining the constitutional basis of the Children's Television Act of 1990 ("CTA")[2] and other federal statues and regulations designed to ensure that children have access to quality educational programs designed specifically for them.

In *Red Lion*, this Court unanimously observed that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish," 395 U.S. at 388, and "as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." *Id.* at 389. Thus, while recognizing that the First Amendment applied to broadcasting, the Court explained:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . . It is the right of the public to receive suitable access to social,*

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[2] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 394 (2000)).

> *political, esthetic, moral, and other ideas and experiences which is crucial here.*

Id. at 390 (emphasis added).[5]

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[5] Those who attack *Red Lion*'s scarcity rationale generally make three arguments. First, they assert that there are more broadcast stations today than in 1969, and new technologies, such as cable television and the Internet, also provide a vast array of content outlets. This argument misapprehends what the *Red Lion* Court meant by scarcity. The Court was referring not to the scarcity of broadcast stations, but rather to the scarcity of the electromagnetic spectrum, and the fact that more people wanted to use it than could be accommodated. That remains true today. As but one example that the demand for spectrum continues to far exceed supply, the FCC's recent auction of wireless service spectrum brought in close to 20 billion dollars. *See* Public Notice, FCC, "Auction of 700 MHz Band Licenses Closes – Winning Bidders Announced for Auction 73," 23 FCC Rcd. 4572 (2008).

Second, *Red Lion* critics argue that, even if spectrum was once scarce, it no longer is because technological advances allow the more efficient use of spectrum. While it is true that technological developments have allowed spectrum to be used more efficiently, *Red Lion*'s observation that "uses for that spectrum have also grown apace," 395 U.S. at 396, remains equally true. Today, with wi-fi, cellphones and other non-broadcast wireless services being used to access the Internet and to communicate in other ways, demand for spectrum is now greater than ever.

Finally, some *Red Lion* critics argue that spectrum is no different than any other economic good, and since all economic goods are scarce, there is no justification for treating broadcasting differently than other media. But those critics ignore that spectrum is not like most other economic goods. It is instead a public good that by law belongs to the United States, not the broadcaster. 47 U.S.C. §§ 301, 304. "A licensed broadcaster is 'granted the free and exclusive use of

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A. The FCC's Children's Television Policy Is Premised In Large Part on *Red Lion*.

The FCC has recognized that children are an important segment of the community entitled to service from broadcast stations since at least 1960, *see Report and Statement of Policy Re: Commission Policy on Programming*, 20 R.R. (P & F) 1901 (1960), and in 1974 formalized and expanded its children's television policy in *Children's Television Report and Policy Statement*, 50 F.C.C. 2d 1 (1974), *aff'd sub nom. Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir 1977). There, the FCC noted that the "landmark decision" in *Red Lion* made plain that "'the Commission is not powerless to insist that [broadcasters] give adequate . . . attention to public issues.'" *Id.* at 4-5 (quoting *Red Lion*, 395 U.S. at 393).

> While the holding of the *Red Lion* case was limited to the fairness doctrine, the Court's opinion has a significance which reaches far beyond the category of programming dealing with public issues. . . . . [*Red Lion*'s] language,

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a . . . valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quotations omitted). On behalf of the public, the government is entitled to demand that, in return for the profit-making opportunity bestowed on a broadcaster by a license, the broadcaster be required to provide compensation to the public in the form of obligations designed to "assure that an important [public] resource -- the airwaves -- will be used in the public interest." *Id.* at 397.

> in our judgment, clearly points to a wide range of programming responsibilities on the part of the broadcaster.

Id. (citations omitted). The FCC concluded that "because of their immaturity and their special needs, children require programming designed specifically for them," and thus it expected "television broadcasters, as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience." *Id.*

In 1990, Congress codified broadcasters' special obligation to serve children by enacting the CTA. Congress found that "it has been clearly demonstrated that television can assist children to learn important information, skills, values, and behavior, while entertaining them and exciting their curiosity to learn about the world around them," and that "as part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children." CTA § 101, 47 U.S.C. § 303a note. The CTA thus requires that, in reviewing the license renewal application of any commercial or noncommercial television licensee, the FCC shall "consider the extent to which the licensee . . . has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs." 47 U.S.C. § 303b(a)(2).

The CTA's legislative history states that its objective is "to increase the amount of educational and informational broadcast television programming available to children." S. Rep. No. 227, 101st Cong.,

1st Sess. at 1 (1989). Both the Senate and House Reports closely examined the constitutionality of imposing an affirmative obligation on licensees to serve the special needs of children. *Id.* at 10-16. H.R. Rep. No. 385, 101st Cong., 1st Sess. at 8-12, (1989), *reprinted in* 1990 U.S.C.C.A.N. 1606, 1612-1616 ("1989 House Report"). The House Committee concluded that requiring the FCC to consider children's programming when renewing licenses was "clearly constitutional under tests established in *Red Lion* and subsequent cases." *Id.* at 11. The Senate Committee likewise concluded that "it is well within the First Amendment strictures to require the FCC to consider, during the license renewal process, whether a television licensee has provided programming specifically designed to serve the educational and informational needs of children in the context of its overall programming." S. Rep. No. 101-227 at 16. The Senate Report observed that in *Red Lion*, "the Supreme Court affirmed that because radio spectrum is not available to all, broadcast licensees have a duty to act as fiduciaries for the public. A fundamental part of that duty is the obligation to serve children, who constitute a unique segment of the television audience." *Id.* at 11 (citation omitted). The Senate Committee further observed that those "attacking the scarcity basis of *Red Lion* [are] arguing that the entire broadcast regulatory scheme in Title III [of the Communications Act of 1934] is unconstitutional . . . . We have shown that this drastic overturning of four decades of Supreme Court precedents i[s] wholly unfounded." *Id.* at 14.

This Court has recognized that Congress' determinations on issues of this nature are entitled

to deference. As the Court has observed, "when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem." *CBS v. Democratic Nat'l Committee*, 412 U.S. 94, 103 (1973).

Overlaying the CTA are the FCC's rules implementing the CTA, which themselves are likewise based on *Red Lion* and its allied precedent. In 1996, the FCC concluded that its initial CTA regulations had not been fully effective in meeting Congressional intent to increase the amount of educational and informational programming for children. *Policies and Rules Concerning Children's Television Programming*, Report and Order, 11 FCC Rcd. 10660, 10661 (1996) ("*1996 Order*"). Among other things, the FCC decided to adopt processing guidelines under which television stations that aired three hours per week of programming designed to educate children at times when children were likely to be watching, would receive staff-level approval of the CTA portion of their license renewal application. *Id.* at 10662-63.

The FCC also addressed broadcasters' arguments that these quantitative guidelines violated the First Amendment. *Id.* at 10728-33. After analyzing Supreme Court precedents such as *Red Lion* and *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), the FCC concluded that the guidelines implementing the CTA were constitutional. It also noted that the D.C. Circuit had recently found constitutional a ban against airing indecent material when children were likely to be viewing. *1996 Order*, 11 FCC Rcd. at 10731 (citing *Action for Children's Television v. FCC*,

825 F.2d 1332 (D.C. Cir. 1988)). The FCC observed that if Congress could constitutionally regulate indecent speech on the assumption that indecent material is harmful to children, "it should follow that the Commission's adoption of less restrictive measures to encourage the airing of material beneficial to children is consistent with the First Amendment." *Id.*

In 2004, the FCC considered how the CTA obligations of television broadcast licensees should apply to digital television ("DTV") broadcasters. *Children's Television Obligations of Digital Television Broadcasters*, Report and Order, 19 FCC Rcd. 22943 (2004). The FCC amended the processing guidelines so that DTV "broadcasters that choose to provide additional channels or hours of free video programming [above and beyond] their required free over-the-air video program service [would] have an increased core [children's] programming benchmark roughly proportional to the additional amount of free video programming they ch[ose] to provide." *Id.* at 22950. On reconsideration, the FCC rejected the arguments of broadcasters that the revised guidelines violated the First Amendment. *Children's Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd. 11065, 11072-73 (2006). In so doing, the FCC relied on the CTA and the fact that under *Red Lion*, "[i]t is well established that the broadcast media do not enjoy the same level of First Amendment protection as do other media." *Id.* & n.41.

The CTA and the FCC regulations implementing it have succeeded in increasing the

amount of children's educational programming. Indeed, the National Association of Broadcasters ("NAB") claims that since the CTA's enactment, there has been a "sea change in the amount, quality and availability of children's programming." Comments of the National Association of Broadcasters at 2, *Children's Television Obligations of Digital Television Broadcasters*, FCC MM Docket No. 00-167 (filed Sept. 4, 2007).

The FCC's own review of the impact of the CTA processing guidelines found that broadcasters aired, on average, approximately four hours of children's programming per week.[4] This represents a doubling of the average of two hours per week of children's programming which NAB claimed that commercial broadcasters were airing at the time the CTA was enacted. *1996 Order*, 11 FCC Rcd. at 10719. Studies confirm that most broadcasters are meeting the three-hour guidelines, and many are exceeding them.[5]

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[4] Mass Media Bureau, FCC, *Three Year Review of the Implementation of the Children's Television Rules and Guidelines 1997-1999* (2001), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-209149A1.pdf.

[5] *See, e.g.*, Kelly L. Schmitt, Annenberg Pub. Policy Ctr. of Univ. of Pa., *The Three-Hour Rule: Is It Living Up To Expectations?* (1999), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_Child/Childrens_Programming/19990628_three_hour_expectations/19990629_three_hour_expectations_report.pdf; Amy B. Jordan, Annenberg Pub. Policy Ctr. of Univ. of Pa., *Is the Three-Hour Rule Living Up to Its Potential?* (2000), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_

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Thus, revisiting *Red Lion* (other than to affirm that it remains good law) could unnecessarily raise questions about the constitutionality of the CTA and the FCC's rules implementing it. That, in turn, could result in reductions in the amount of educational programming available to children, thereby increasing the likelihood that they will instead watch programming that may not be appropriate for them.

B. This Court Need Not Risk Disturbing The Children's Television Act Because This Case Does Not Implicate *Red Lion* Or Broadcasters' Public Interest Obligations.

It is not necessary for the Court to reconsider *Red Lion* or *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to resolve the case before it. Although the broadcast networks presented a variety of arguments below, the court of appeals decided the case based only on the grounds that the FCC's change in policy was without adequate explanation and therefore violated the APA. While the court of appeals did discuss the networks' additional constitutional arguments, it did so only in *dicta*. 489 F.3d at 462 n.12. Indeed, the court of appeals explicitly refrained from deciding the case on constitutional grounds, referencing this Court's admonition that a "fundamental and longstanding principle of judicial restraint requires that courts

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Child/Childrens_Programming/20000626 Three hour rule report/20000626_three_hour rule_report.pdf.

avoid reaching constitutional questions in advance of the necessity of deciding them." *Id.* at 462 (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445 (1988)). Even in *dicta,* the court of appeals addressed neither *Red Lion* nor broadcasters' public trustee duties. It merely acknowledged the broadcasters' claim that the grounds for treating broadcast media differently have eroded and, referring to the rationales cited in *Pacifica*, observed "that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children." 489 F.3d at 465.

While *Amici* do not believe the Court should disturb *Pacifica*, the rationales underlying *Red Lion* and *Pacifica* are, in any event, distinct. In *Pacifica,* the Court did not rely on the public trustee rationale or scarcity. While recognizing that the reasons for giving broadcasting special treatment were many and complex, it held that *only two* of those reasons were relevant to indecency: (1) that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and (2) that "broadcasting is uniquely accessible to children, even those too young to read." 438 U.S. at 748, 749. Justice Brennan noted that "The opinions of my Brothers Powell and Stevens rightly refrain from relying on the notion of 'spectrum scarcity' to support their result. As Chief Judge Bazelon noted below, 'although scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship.'" *Id.* at 770 n.4 (Brennan, J., dissenting) (citation omitted). More recently, in *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 748 (1996), which upheld one provision

in the Cable Television Consumer Protection and Competition Act of 1992[6] designed to protect children from indecent programming on cable public and leased access channels, the plurality explained that a medium's scarcity "has little to do with a case that involves the effects of television viewing on children."

Therefore, even if this Court should find it necessary to go beyond the APA issue to decide this case, and even if it were inclined to decide the case favorably or unfavorably to petitioners based on *Pacifica*, it need not, and should not, consider issues relating to spectrum scarcity, public trustee obligations of broadcasters, or the continuing validity of *Red Lion*.

II. THE V-CHIP AND THE TV PROGRAM RATINGS SYSTEM ARE NOT AN EFFECTIVE LESS RESTRICTIVE ALTERNATIVE.

Should the Court decide to address the constitutionality of the FCC's actions here, it may need to consider whether less restrictive alternatives are available to protect the well-being of children. While *Amici* believe the Court should not reach that issue, we address it here in case the Court decides to do so.

Congress has recognized that "it is difficult to think of an interest more substantial than the

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[6] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.).

promotion of the welfare of children."[7] Moreover, the mere existence of a possible alternative means of achieving the government's interest is not enough to find the FCC's action unconstitutional; rather, the alternative must be "*feasible and effective*." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000) (emphasis added).

Network broadcasters are likely to argue, as they did below, that the V-Chip and its associated TV program ratings system provide a less restrictive alternative to the indecency rules at issue. In *dicta*, the court of appeals expressed some sympathy, although without citation or analysis, for the broadcasting industry's argument:

> The Networks argue that the advent of the V-chip and parental ratings system similarly provide a less restrictive alternative to the FCC's indecency ban .... The FCC's arguments [to the contrary] are not without merit, but they must be evaluated in the context of today's realities .... [B]locking technologies such as the V-chip have empowered viewers to make their own choices about what they do, and do not, want

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[7] 1989 House Report at 11, *reprinted in* 1990 U.S.C.C.A.N. at 1616. *See also* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), § 551(a)(8) (codified at 47 U.S.C. § 303 note) (Congress finds there is a "compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children").

> to see on television . . . . [T]echnological advances may obviate the constitutional legitimacy of the FCC's robust oversight.

Fox Television Stations, 489 F.3d at 466 (footnote omitted).

The V-Chip, however, has not been the technological panacea that the court of appeals was led to believe. It is but one tool, of limited reach, to safeguard children from exposure to programming that their parents believe is inappropriate. For the V-Chip and the TV program ratings system to be an effective less restrictive alternative, certain conditions must be met. First, all television programming must be rated, and the ratings must be consistent and accurate. Second, parents must be aware of the availability of the V-Chip and the TV program ratings system. Third, the V-Chip must be user-friendly for parents. Fourth, all TV sets must be equipped with the proper V-Chip technology. The absence of any of these conditions prevents the V-Chip from functioning as an effective less restrictive alternative.

Amici will briefly review the legislative origin and purpose of the V-Chip before assessing the current state of the four core conditions necessary for the V-Chip's success.

A. As Implemented by the FCC, The Efficacy of the V-Chip Hinges Entirely on Voluntary and Unenforceable Industry Guidelines.

The V-Chip program is a "complicated mix of government regulation and industry self-policing,

creating a system that combine[s] mandated hardware with voluntary software." Kathryn C. Montgomery, *Generation Digital: Politics, Commerce, and Childhood in the Age of the Internet* 44 (2007). The FCC, fulfilling the requirements of Section 551 of the 1996 Act,[8] required that by January 2000, all television sets with screens 13 inches or larger that are shipped in interstate commerce or manufactured in the United States must include "V-Chip" blocking hardware.[9] The 1996 Act also required adoption of a TV program ratings system to work in conjunction with the V-Chip. The V-Chip reads an electronic code, transmitted with the television signal, that identifies a program's rating. By detecting the encoded rating, the V-Chip, when programmed to do so, can block programs based on the rating levels selected beforehand by parents.[10]

Rather than imposing a uniform, mandatory TV program ratings standard on the broadcast, cable and program production industries, Congress permitted those industries to develop a set of TV

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[8] 1996 Act § 551(c), 47 U.S.C. § 303(x) (2000).

[9] *Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings*, Report and Order 13 FCC Rcd. 11248 (1998). Gloria Tristani, counsel to *Amici*, is a former FCC Commissioner (1997-2001) and was Chair of the FCC's V-Chip Task Force (1999-2001) that issued a separate statement to this Report and Order.

[10] *See generally* Patricia Moloney Figliola, *V-Chip and TV Ratings: Monitoring Children's Access to TV Programming* (Cong. Research Serv., CRS Report for Congress Order Code RL32729, Jan. 10, 2005) ("CRS V-Chip Report"); *see also* FCC, "V-Chip: Viewing Television Responsibly," http://www.fcc.gov/vchip (last visited June 5, 2008).

program ratings. NAB, the National Cable Television Association ("NCTA") and the Motion Picture Association of America ("MPAA") jointly created an initial version of the TV Parental Guidelines, which industry first implemented in early 1997.[11] *See Implementation of Section 551 of the Telecommunications Act of 1996, Video Program Ratings*, Report and Order, 13 FCC Rcd. 8232, 8233-34 (1998) ("*FCC 1998 Report and Order*"). Industry also established a TV Parental Guidelines Oversight Monitoring Board ("Board"). 12 FCC Rcd. 3266-67.

Public health organizations, parents groups, public interest groups and members of Congress thereafter expressed concern about the limitations of industry's initial voluntary ratings system because it provided only age-based ratings and did not assess the content of individual programs. *FCC 1998 Report and Order*, 13 FCC Rcd. at 8234. Discussion between industry and certain advocacy groups, including *Amici* AAP, Children Now and PTA, ensued, and their negotiations led to the submission to the FCC of revised guidelines in August 1997, which contained both age-based and program content-based indicators. *Id.* at 8235 n.19. In addition, both sides agreed that membership of the Board would be expanded to include 5 non-industry members (out of 24 members). *Id.* at 8243. The revised guidelines sought to provide a content-based

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[11] *See* Letter from Jack Valenti, President, MPAA., *et al.*, to William F. Caton, Secretary, FCC, submitting TV Parental Guidelines (Jan. 17, 1997), *reprinted as* App. to Public Notice, FCC, "Commission Seeks Comment on Industry Proposal for Rating Video Programming," 12 FCC Rcd. 3260, 3264-73 (1997).

system for rating programs with sexual, violent or other material that parents might consider inappropriate for their children. *Id.* at 8235. Industry committed to voluntarily broadcast signals with these ratings embedded in their programming. *Id.* at 8233. The Guidelines were to apply to all television programming except news, sports, and unedited MPAA rated movies on premium cable channels. *Id.* at 8235. In 1998, the FCC accepted the revised TV Parental Guidelines ("TV program ratings"). *Id.* at 8247.

In the course of negotiating the TV program ratings, industry made other voluntary commitments to the FCC. In exchange for industry's voluntary ratings system to be given a "fair chance" to work in the marketplace, industry specifically pledged to work to:

> educate the public and parents about the V-chip and the TV Parental Guideline System; encourage publishers of TV periodicals, newspapers and journals to include the ratings with their program listings; and evaluate the system.[12]

Industry also pledged that "[i]ndependent, scientific research and evaluation will be undertaken once the V-chip has been in the marketplace." *Id.* at 8279 (App. D, Industry Submission containing July 10,

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[12] *FCC 1998 Report and Order*, 13 FCC Rcd. at 8281 (App. D, "Industry Submission of Aug. 1, 1997," at Attach. 2 to the letter from Jack Valenti, President, MPAA., *et al.*, to William F. Caton, Secretary, FCC (Aug. 1, 1997)).

1997 Agreement on Modifications to the TV Parental Guidelines ¶ 7).

The FCC relied upon industry's representations in accepting the proposed ratings system. *See, e.g., id.* at 8236, 8237. To *Amici*'s knowledge, however, industry has never conducted the promised evaluations.

Despite its theoretical promise, the V-Chip has not proved to be the effective solution many thought it would be, as we now show.

B. The V-Chip Cannot be an Effective Less Restrictive Alternative Unless it Satisfies the Preconditions Necessary to Make it Effective.

1. TV Program Ratings Do Not Consistently and Accurately Reflect Program Content.

The V-Chip can work no better than the TV program ratings system upon which it depends. While the TV ratings system was created to work in conjunction with the V-Chip and inform parents of program content, it is at best an imperfect tool in its current form. The hybrid age-based and content-based ratings system comprises six categories of age-based ratings and four categories of content-based ratings. *FCC 1998 Report and Order*, 13 FCC Rcd. at 8235-36. Some of the categories are tailored to rate programs intended solely for children:

- TV-Y (suitable for all children); and
- TV-Y7 (directed to older children age 7 and above – programs otherwise in this

category that contain fantasy violence that may be "more intense or more combative" receive a special designation, TV-Y7-FV; the "FV" designation does not appear in any other category).

For programs designed for the entire audience, the general categories are:

- TV-G (general audience);
- TV-PG (parental guidance suggested – the program may contain one of more of the following: moderate violence (denoted "V"), some sexual situations ("S"), infrequent coarse language ("L") or some suggestive dialogue ("D"));
- TV-14 (parents strongly cautioned – the program contains intense violence (denoted "V"), intense sexual situations ("S"), strong coarse language ("L") or intensely suggestive dialogue ("D")); and
- TV-MA (mature audiences only – the program contains one or more of the following: graphic violence (denoted "V"), explicit sexual activity ("S") or crude indecent language ("L")).[13]

For those broadcasters that chose to participate in the TV program ratings system, these ratings appear during the first fifteen seconds of

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[13] *FCC 1998 Report and Order*, 13 FCC Rcd. at 8236. *See also* CRS V-Chip Report at 5.

most television programs. *FCC 1998 Report and Order*, 13 FCC Rcd. at 8236. Because the TV ratings system is voluntary, however, networks are under no legal obligation to encode their programming with both the age and content categories, or even to participate in the program at all. In fact, when many industry members first voluntarily implemented the TV ratings program, NBC, although having committed to using the age-based ratings, declined to assign content-based ratings, and did not do so until 2005. *See NBC Adopts Content Ratings*, Broadcasting & Cable (May 2, 2005), *available at* http://www.broadcastingcable.com/article/CA528789.html. The point should be obvious: By its nature, a purely voluntary TV program ratings system cannot be relied upon as an effective less restrictive alternative.

a. Voluntary and Decentralized Implementation of the TV Ratings System Impedes the Achievement of Accurate and Consistent Ratings.

Along with the ratings system, industry established the Board, which was intended to promote the accurate and consistent application of the program ratings to television programming. *FCC 1998 Report and Order*, 13 FCC Rcd. at 8237. The Board has a total of 24 members consisting of a chairman and six "members each from the broadcast television industry, the cable industry, and the program production community." The Board also includes five "non-industry members selected by the

[Board's] Chairman from the advocacy community."[14] The Board's own bylaws, however, restrict it from carrying out the monitoring and enforcement functions that its "oversight" designation might suggest:

> The [Board] has one mandate: *From time to time* to review programs which have received widespread and verifiable criticism about alleged mis-applications of Guidelines. The Board does *not* have the authority to change Guidelines as they are written or to insert new Guidelines.

TV Parental Guidelines Council, Inc., *The Oversight/Monitoring Board: Its Mandate and Its Process* 1 (June 25, 1997) ("*Board Bylaws*") (emphasis added) (on file with author).

The power to assign ratings rests with video programmers and distributors – namely, the broadcast and cable networks – not the Board. Each broadcast network and many of the cable networks maintain internal Standards and Practices Departments that are responsible for assigning ratings to the individual network's programs.[15] Moreover, local broadcasting affiliates can override the rating assigned by a network to a particular

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[14] *Id.* *Amici* AAP, Children Now and PTA are currently three of those five members.

[15] *See, e.g.*, George Dessart, Museum of Broadcast Communications, *Standards and Practices*, http://www.museum.tv/archives/etv/S/htmlS/standardsand/standardsand.htm (last visited May 29, 2008).

program and assign it another rating. *See* CRS V-Chip Report at 3.

Because the power to rate programs rests exclusively with each individual industry member, how each programmer assigns ratings is left entirely to its discretion. The Board plays no role in this ratings process and is merely available as a secondary resort to address after-the-fact consumer complaints about the rating of a specific program. Even if the Board were to decide that a program had been incorrectly rated, however, the network or distributor, *not* the Board, would have the final say on whether to change or maintain the challenged rating. *See Board Bylaws* at Attach. p. 2.

The lack of centralized oversight of the program ratings process means that there is no mechanism for ensuring any consistency or accuracy in the assignment of ratings across numerous networks and distributors – or even for ensuring that programs are rated. This is not to suggest that a centralized ratings body would solve the problem. Given the massive amount of programming involved, that may well be impractical. It does mean, however, that because of the inherent difficulties of achieving accurate and consistent results, the current TV program ratings system cannot be relied upon to serve as an effective less restrictive alternative in protecting children from material their parents believe is inappropriate.

b. Research Indicates That the TV Ratings System Is Neither Consistently nor Accurately Applied, and Significant Numbers of Parents Find The Ratings Unreliable.

Concerns about the lack of uniformity in the application of ratings by networks are corroborated by research. The ratings system would suggest, for example, that a parent could reasonably expect to encounter a lower incidence of crude language in a TV-PG program than in a TV-14 program. One study, however, found that exactly the opposite to be true: When evaluating the content of network programming across four years, researchers found more instances of offensive language in TV-PG programs than in TV-14 programs. Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 4 J. Broad. & Elec. Media 554, 567 (2004). The research further raised the question whether the mere existence of ratings has contributed to "ratings creep," whereby programmers perceive program ratings as giving them greater license to use increasingly objectionable words. *Id.* ("As concerned parents and legislators feared, it seems that warning systems do indeed give broadcasters greater freedom to include vulgarities").[16]

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[16] *Cf.* Kimberly M. Thompson & Fumie Yokota, *Violence, Sex, and Profanity in Films: Correlation of Movie Ratings With Content*, Medscape General Medicine (July 13, 2004) at 2, *available at* http://www.pubmedcentral.nih.gov/articlerender.fcgi?tool=pubmed&pubmedid=15520625 (finding that ratings

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Parents, too, have mixed views on the TV program ratings' accuracy. Of those parents who have used the TV ratings, only a little more than half (52%) report that the shows are rated accurately. Victoria Rideout, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004), *available at* http://www.kff.org/entmedia/upload/Parents-Media-and-Public-Policy-A-Kaiser-Family-Foundation-Survey-Report.pdf. Thirty-nine percent of parents report that most shows are *not* rated accurately. *Id.*

In fact, inaccurate TV program ratings surprised parents viewing the 2002 and 2003 Billboard Music Awards programs that triggered the instant proceeding. Given the TV-PG(D) rating assigned to those live programs – a rating that supposedly shields viewers from the "F-Word" – not even an informed V-Chip user could have protected children from the objectionable comments aired during these broadcasts.[17] Parents therefore have

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creep occurred over the last decade, and that today's movies contain significantly more violence, sexual content, and profanity on average than movies of the same age-based rating (*e.g.*, G, PG, PG-13, R) a decade ago); Lucille Jenkins, *et al.*, "*An Evaluation of the Motion Picture Association of America's Treatment of Violence in PG-, PG-13-, and R-Rated Films*," Pediatrics (May 2005) at e512-13 (finding that MPAA ratings do not predict the frequency of violence that occurs in films, indicating ratings creep).

[17] *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum of Opinion and Order, 21 FCC Rcd. 13299, 13319-20 (2006) ("*2006 Complaint Order*"); *see*

(Cont'd.)

good reasons to believe the networks are not applying the TV program ratings accurately.[18]

Parents' dissatisfaction with the TV program ratings system to assist them in filtering program content is also reflected in their views about the continuing need for additional government regulation. According to the most recent Kaiser survey, two-thirds of parents (66%) say that they support government regulations "to limit the amount of sex and violence on TV during the early evening hours." Victoria Rideout, *Parents, Children & Media: A Kaiser Family Foundation Survey* 3 (2007) ("*2007 Kaiser Survey*").

c. The TV Program Ratings System Does Not Rate Commercials.

Another limitation of the TV program ratings system is that it does not rate commercials. *See FCC 1998 Report and Order*, 13 FCC Rcd. at 8242. This limitation is no small matter. A Federal Trade Commission report on marketing of violent

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also id. at 13305-06 (describing Nielsen Media Research indicating that during the 2003 Billboard Music Awards broadcast, approximately twenty-three percent of viewers were under 18 and eleven percent of viewers were between the ages of 2 and 11).

[18] *See id.* at 13306, n.47 (Fox's policy was to rate any programming containing the "F-Word" TV-MA- indicating that the program was for a mature adult audience and therefore possibly unsuitable for children under 17— although that was *not* the rating that Fox actually applied to the Billboard Music Awards programs.)

entertainment found that inappropriate advertising on broadcast television is in fact reaching children. The report found that TV ads are a primary medium for promoting new movies and that studios' advertising campaigns (for movies rated R for violence) at least in part targeted a TV-viewing audience that included people aged 12 and above.[19]

Unrated advertising is an issue for parents. In focus group sessions, many parents were at least as concerned about the child-inappropriate content of television advertising as they were about the content of television shows. *2007 Kaiser Survey* at 7. Parents cannot avoid objectionable content, however, when it unexpectedly appears in unrated commercials. *Id.* The TV program ratings system is therefore not an alternative at all for filtering content in commercials.

2. Parents are Not Aware of the Availability of the V-Chip.

The V-Chip is not self-effectuating. To perform its function, the V-Chip must be activated and programmed by parents. To activate the V-Chip, parents must successfully complete several steps: after entering a password, they access a series of on-screen menus that permit them to select which

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[19] Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (Sept. 2000) at 14, *available at* http://www.ftc.gov/reports/violence/vioreport.pdf; *Cf. id.* at iv, 17 (finding that movie promoters routinely target children under 17 and make "little effort" to restrict access to violent material).

ratings will be acceptable and unacceptable for viewing. *See, e.g.*, Ctr. for Media Educ. & Henry J. Kaiser Family Foundation, *A Parent's Guide to the TV Ratings and V-Chip* (1999), *available at* http://i.ncta.com/ncta_com/PDFs/VChip%202000%20Brochure.pdf. Despite the facial appeal of blocking technology, the past decade of V-Chip deployment has revealed definite limitations in this technology and its companion rating system.

For example, roughly a decade after its adoption, use and awareness of V-Chip capability remain low. According to the *2007 Kaiser Survey* (at 10), only sixteen percent of all parents report ever having used the V-Chip. Yet although only sixteen percent of parents report using the V-Chip, two-thirds of parents report that they are "very" concerned that children are exposed to too much inappropriate content in the media. *Id.* at 1, 3. Nearly a quarter (23%) of all parents believe that the media has "a lot" of influence on their children. *Id.* at 7. Moreover, a plurality of those parents concerned about children's exposure to media content continues to point to television as the medium that concerns them the most (32%). *Id* at 3.

The availability of TV sets with V-Chips notwithstanding, many families simply do not realize that they have V-Chip capabilities in their sets. Amy Jordan & Emory Woodard, Annenberg Pub. Policy Ctr. of Univ. of Pa., *Parents' Use of the V-Chip to Supervise Children's Television Use* 3 (2003), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Media and_Developing_Child/Childrens_Programming/20030402_Children_and_TV_Roundtable/20030402_ParentsVchip_report.pdf ("*2003*

Annenberg Study"). In fact, in the *2003 Annenberg Study*, more than one-third of families with V-Chip equipped sets (35%) mistakenly reported that their TV set was not equipped for blocking programs based on the ratings system. *Id.* A significant absence of parental V-Chip awareness was also evident in the more recent *2007 Kaiser Survey*. A high proportion of parents (82%) report having purchased a new TV set since January 2000 (the date of implementation for the FCC mandate requiring TV sets to be equipped with a V-Chip). *Id.* at 9. Although these parents therefore can be presumed to have a V-Chip-equipped set, more than half of them (57%) were not aware that their TV set has a V-Chip. *Id.*

Research indicates that accelerating the development of parental awareness programs could increase use of the V-Chip. *See, e.g.*, CRS V-Chip Report at 9. This could be accomplished by a variety of means, including "public service announcements on television, educational materials on the FCC website, and possibly public service advertisements in print media." *Id.* Such measures, however, require the full and active participation of industry. Industry's commitment to publicizing the V-Chip and TV program ratings, however, has been sporadic and uneven. In fact, the V-Chip and TV program ratings public education effort faces an inherent obstacle because industry, which is in the best position to educate, faces a conflict of interest: Blocking technology can reduce the number of viewers of a program, and ratings can highlight content that is inappropriate for children, thereby potentially increasing the amount of programming parents choose to block.

3. Operation and Use of the V-Chip and TV Program Ratings System are Not Easily Understood by Most Parents.

Using the V-Chip is complex and frustrating for many parents. Even when parents are aware of its availability, V-Chip use is hindered by users experiencing difficulty with its operation. The *2003 Annenberg Study* (at 3) reported that many families found the V-Chip to be "hidden and difficult to program." This study also found that the multi-step process of programming the V-Chip proved confusing and frustrating: "No fewer than five menus must be navigated and parents must move quickly or programming menus disappear." *Id.* When a follow-up interview study asked participants to program the V-Chip to block TV-MA programs with violence, only twenty-seven percent of mothers felt that they could do it. *Id.* at 4.

For the V-Chip to serve its purpose, parents must also be thoroughly familiar with the TV program ratings system's shorthand symbols for the age-based and content-based codes. Thus, even if the TV ratings system could be relied upon to consistently and accurately inform parents of program content, the system cannot be effective if most parents do not understand it well enough to use it. Research indicates that although most parents have heard of the TV ratings, most do not understand what the ratings mean. *2007 Kaiser Survey* at 8. Among parents with children aged 2-6, less than one-third (30%) of parents could name any of the ratings that correspond to programming suitable for their children (TV-G, TV-Y and TV-Y7). The rating TV-Y7, for example, was named by just

eleven percent of the parents with children in this age category. *Id.*

Even fewer parents understand the content-based descriptors than the age-based ratings. Roughly half (51%) understood that "V" indicates violence, thirty-six percent knew that "S" stands for sex, and only two percent knew that "D" indicates suggestive dialogue. *Id.* at 9. Among all parents, only eleven percent knew that the "FV" rating denoted content displaying fantasy violence. *Id.* at 8. All the more troubling, nine percent of parents mistakenly believed that "FV" assured them that they would be watching a program suitable for "family viewing." *2007 Kaiser Survey* at 8.

4. The V-Chip is Constrained by Technological Limitations.

V-Chip technology is of no value if the TV sets parents use are not equipped with the necessary V-Chip. And many are not. According to the *2007 Kaiser Survey*, eighteen percent of all parents do not have a V-Chip-equipped TV set. *Id.* at 9.[20]

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[20] There also is an unknown, but likely substantial, number of households which, although they may have a V-Chip-equipped TV sets, also have a number of legacy non-V-Chip TV sets in children's bedrooms. The *2003 Annenberg Study* (at 4) reported that with an average of four TV sets per family (among study participants), children who are "truly motivated" to see blocked shows can "pretty easily" find it on a non-V-Chip-equipped TV set in the home. *See also* Annenberg Pub. Policy Ctr. of Univ. of Pa., *Television & Children's Media Policy: Where Do We Go From Here?* 4 (Feb. 28, 2003), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/Media_and_Developing_Child/Childrens_Programming/20030402_Children_and_T

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Moreover, even among those households with V-Chip-equipped TV sets, many of those TV sets do not have the updated V-Chip software now mandated by the FCC. Recognizing that the TV ratings system could be improved over time, in 2004 the FCC required that all digital televisions sold in the United States after March 15, 2006, contain an upgraded V-Chip. *See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, Report and Order, 19 FCC Rcd. 18279 (2004); 47 C.F.R. § 15.120(d)(2). The updated V-Chip technology contains software that enables TV sets to "be able to respond to changes in the content advisory rating system." *Id.*

In theory, the transition to digital television should afford industry and other stakeholders an opportunity to improve the development and deployment of the V-Chip and the TV ratings system.[21] Such an opportunity will never be realized,

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V_Roundtable/20030402ChildrensMediaPolicyConference_transcript.pdf (statement of Amy Jordan, Senior Researcher). Concerns over the ubiquitous presence of legacy TV sets are heightened by the knowledge that many of these sets are in children's bedrooms. *See* Donald F. Roberts, Ph.D., *et al.*, Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (Mar. 2005) (cited in *2006 Complaint Order*, 21 FCC Rcd. at 13319) (finding that 68% of children aged 8 to 18 have a TV set in their bedrooms, and nearly half of those sets rely on broadcast solely because they lack cable or satellite connections).

[21] The Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, § 3002, Title III, 120 Stat. 21-22 (2006) (to be codified at 47 U.S.C. § 309 note), requires

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however, unless television sets are in widespread compliance with the FCC's V-Chip upgrade requirements. Last year, for example, the FCC investigated seven television manufacturers and discovered that several manufacturers were shipping TV sets that lacked the required upgraded V-Chip. *See* News Release, FCC, "Enforcement Bureau Adopts DTV V-Chip Consent Decrees Totaling Over 3.4 Million" (Apr. 10, 2008), *available at* http://www.fcc.gov/eb/News_Releases/DOC-281451A1.html (last visited May 28, 2008). The FCC entered into consent agreements totaling over $3.4 million with seven separate manufacturers to resolve the investigations into possible violations. *See, e.g.*, *Funai Corp.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd. 19663 (2007).

C. The Unresolved Challenges of the V-Chip and the TV Ratings.

The court of appeals was mistaken about the ability of "advanced technologies," and the V-Chip in particular, to empower parents to protect their children from inappropriate media. The court of appeals' confidence is especially misplaced given the significant and ongoing shortcomings of the V-Chip and its companion TV program ratings that have

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broadcasters to cease analog broadcasting and simulcast 100% of their programming on their digital channel by February 17, 2009. *See* U.S. Gen. Accounting Office, GAO-08-510, *Digital Television Transition: Majority of Broadcasters Are Prepared for the DTV Transition, but Some Technical and Coordination Issues Remain* (2008); *see also* CRS V-Chip at 13 n.8.

subsequently become apparent. Research indicates that low V-Chip usage reflects in no small part the fact that many parents are still not aware that this tool even exists. And if they are aware, they often do not know how to program and use the V-Chip or how to use the complex, confusing and often inaccurate TV ratings.

The V-Chip and its TV ratings system were welcomed with great expectation. The V-Chip was hailed as a modern tool to empower parents to protect their children from media content they find inappropriate. But for any tool to be useful, it must actually perform its task in a consistent and reliable manner, it must be known to be available, it must be easy to operate, and it must work reasonably well.

With more than half of parents unaware that they have a V-Chip-equipped TV set, with many parents reporting the difficulties of using the V-Chip and the TV ratings, and with reports about the lack of reliability and accuracy of the TV ratings, the V-Chip is not yet an effective tool for its intended purpose. The promise of the V-Chip to protect children from programming that is inappropriate for them remains an unfulfilled promise.

CONCLUSION

The Court need not, and should not, reach any First Amendment issues to decide this case. If the Court nevertheless does reach those issues, it should not disturb *Red Lion*. Should the Court find occasion to reach the issue of less restrictive alternatives, it

should find that the V-Chip and its TV program ratings system do not constitute an effective less restrictive alternative.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

Brief Amici Curiae of the American Center for Law & Justice and United States Representatives Charles Pickering, Roscoe Bartlett, Kevin Brady, Paul Broun, Danny Davis, John Doolittle, Mary Fallin, Trent Franks, Wally Herger, Jim Jordan, Doug Lamborn, Kenny Marchant, Jeff Miller, Marilyn Musgrave, Joe Pitts, Mark Souder, Tim Walberg and Dave Weldon In Support of Petitioner

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QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of any "obscene, indecent, or profane language," 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

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INTEREST OF AMICI[1]

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues, with a particular emphasis on the First Amendment.[2] Although this case calls for avoidance of any constitutional analysis, its proper resolution is of significant interest to the ACLJ as it involves issues closely related to First Amendment concerns.

The ACLJ maintains a strong interest in helping to ensure the protection of our nation's youth from harmful material, including pornography, obscenity, and indecency. Because Congress has specifically tasked the Federal Communications Commission (FCC or Commission) with regulating broadcast media, and the Commission has provided adequate justification for its current indecency regulation policy–which affords minors greater protection from the harm occasioned by exposure to indecent material without infringing the

[1] The parties in this case have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

[2] *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

constitutional rights of adults–it is essential that this policy be respected by broadcasters and upheld by this Court.

Amici, United States Representatives Charles Pickering, Roscoe Bartlett, Kevin Brady, Paul Broun, Danny Davis, John Doolittle, Mary Fallin, Trent Franks, Wally Herger, Jim Jordan, Doug Lamborn, Kenny Marchant, Jeff Miller, Marilyn Musgrave, Joe Pitts, Mark Souder, Tim Walber and Dave Weldon currently serve in the 110th Congress. These amici strongly support the FCC's discretionary authority to adopt new broadcast indecency regulations that provide greater protection to children without infringing the constitutional rights of adults. In particular, these amici support the new indecency policy at issue, as clearly articulated by the FCC.

SUMMARY OF ARGUMENT

While this Court has held that the Constitution protects the right of adults to access indecent material, the government has a vital interest in protecting minors from the harmful effects occasioned by exposure to indecency. One of the primary means by which the government has traditionally afforded this protection is by regulating indecency in broadcast media, a form of communication widely accessible to children of all ages. Congress has vested the FCC specifically with the authority to enact policies for this purpose, and the Commission has long adhered to a system, approved by this Court, *see FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), of heightened regulation during times when children are likely to comprise a significant portion of the broadcast

audience. This allows the FCC to help minimize exposing minors to indecency without infringing the right of adults, who may continue to access such material at times when children are less likely to be among the audience.

Within its broadcast regulation regime, the FCC has placed particular emphasis on the importance of context when determining whether specific material is indecent. For a time, the Commission refrained from finding expletives actionably indecent if they were not repeated. Ultimately, however, the FCC recognized that basing an indecency determination on a single factor–whether the material was repeated–undermines its well-established context-based approach to such decisions. Recognizing the reality that even the single use of an expletive, in some contexts, may have the harmful effect on children that the FCC's broadcast indecency regulation policies are intended to prevent, the Commission concluded that the single factor of repetition, or lack thereof, would no longer be dispositive of whether material is indecent.

Instead, the FCC explained that it would look to the overall context of all broadcast material, including non-repeated expletives, when making indecency determinations. Thus, contrary to the Second Circuit's conclusion, the FCC's new policy is based not on the harm occasioned by the "first blow" of exposure to indecency but on the Commission's wholly rational recognition of a need for consistent application of its context-based approach to indecency regulation, in which the harm of the "first blow," like the repetition of expletives, is merely a single factor for consideration. Because this policy is entirely reasonable and was clearly articulated and explained

by the FCC, it is sufficient to survive scrutiny under the arbitrary and capricious standard of the Administrative Procedures Act (APA).

Rather than forcing the FCC to ignore harm to children simply because offensive material is uttered in isolation, this policy allows the FCC to weigh all the relevant contextual factors before determining whether material is indecent. As previous FCC decisions demonstrate, consideration of the entire context of broadcast material may result in a determination that expletives are not actionably indecent even when repeated throughout a program. The FCC should be free to apply this context-based approach in a consistent manner, regardless of how many times offensive material is broadcast in a single program.

ARGUMENT

I. THE FCC'S INDECENCY POLICY SERVES THE GOVERNMENT'S COMPELLING INTEREST IN PROTECTING CHILDREN FROM EXPOSURE TO INDECENT MATERIAL DURING TIMES THAT CHILDREN ARE LIKELY TO BE PART OF THE BROADCAST AUDIENCE.

This Court repeatedly has affirmed that the government in general—and the FCC in particular—have a compelling interest in preventing or limiting the exposure of children to indecent and obscene material. *See, e.g., Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (noting that the statute at issue was "accompanied with an extremely important

justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material"). In *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court explained: "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." *Id.* at 639. Distinguishing the state's interest in ensuring the protection of constitutional rights from its "independent interest in the well-being of its youth," *id.* at 640, this Court noted:

> The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules . . . [I]t suffices to say that regulations of communication addressed to them need not conform to the requirements of the First Amendment in the same way as those applicable to adults.

Id.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court affirmed the FCC's authority to regulate minors' access to indecent broadcasting just as "[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source," *id.* at 749. The Court observed that

> broadcasting is uniquely accessible to children, even those too young to read. Although . . . [a] written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant.

Id. at 749. The *Pacifica* Court reaffirmed its holding in *Ginsberg* that "the government's interest in the 'well-

being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression." *Id.* (citation omitted). The Court concluded that "[t]he ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting." *Id.* at 750.

In accord with this Court's holdings, the FCC has long held that "the concept of 'indecent' is intimately connected with the exposure of children to [patently offensive] language." *In Re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, New York*, 56 F.C.C.2d 94, 98 ¶ 11 (1975) ("Pacifica Order"). For this reason, the FCC most heavily regulates broadcast media during the times when children are expected to be in the audience. This includes primetime programs—such as the Billboard Music Awards Show—that are "designed to draw a large nationwide audience . . . [and can] be expected to include many children." *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299, 13305 ¶ 18 (2006) ("Remand Order"). The FCC's policies reflect the view outlined in *Pacifica* that broadcast programming is "uniquely accessible to children," regardless of their ability to read. *Id.* at 13318 ¶ 47 (quoting *Pacifica*, 438 U.S. at 749).

Importantly, as explained in Section III, *infra*, the FCC's policy here does not "reduce the adult population . . . to . . . only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). The FCC's context-based approach continues to allow the broadcasting of ample programming geared toward

adults. The FCC's indecency policy represents a rational, sensible balance of the government's compelling interest in protecting children from indecent content and its interest in ensuring that adults are not limited solely to broadcast material suitable for young children.

II. THIS COURT SHOULD UPHOLD THE FCC'S BROADCAST INDECENCY POLICY CHANGE BECAUSE THE FCC HAS ARTICULATED A SUFFICIENTLY REASONED BASIS FOR THE CHANGE.

The Second Circuit's holding, that the FCC failed to articulate a reasoned explanation for its indecency regulation policy change sufficient to pass muster under the APA, is plainly wrong. The FCC's order clearly stated the bases for the agency's decision, each of which is rationally related to the Commission's compelling interest in protecting minors from indecent material. This Court has recognized "that '[regulatory] agencies do not establish rules of conduct to last forever,' *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), and "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances." *Id.* at 57 (citation omitted). Coupled with the fact that the FCC provided the requisite "reasoned analysis," *id.*, of its changed indecency policy, these recognitions require upholding that policy.

A. The lower court erred by failing to analyze the FCC's stated reasons for its policy change.

The Second Circuit's opinion demonstrates a patent misreading of the FCC order at issue, *see Remand Order*, in which the FCC clearly stated the rationale for its change in broadcast indecency regulation. The Second Circuit correctly recognized this Court's admonition that courts may not uphold an agency decision by "'supply[ing] a reasoned basis for the agency's action that the agency itself has not given,'" *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 455 (2d Cir. 2007) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); however, the court ran afoul of the corollary "fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency*." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (emphasis added). The Second Circuit erred in this respect by failing to analyze the FCC's changed indecency policy on the basis of "the grounds invoked by the agency." According to the Second Circuit, "[t]he primary reason for the crack-down on fleeting expletives advanced by the FCC is the so-called 'first blow' theory described in the Supreme Court's *Pacifica* decision." *Fox Television Stations, Inc.*, 489 F.3d at 457 (citing *Remand Order* at 13309 ¶ 25). While the FCC certainly discussed the "first blow" theory in the *Remand Order*, it did so only within the framework of its new *context-based* policy.

As the *Remand Order* explained, "decisions issued before [the] *Golden Globe* [order] had suggested that

expletives had to be repeated to be indecent but 'descriptions or depictions of sexual or excretory functions' did not need to be repeated to be indecent . . ." 21 F.C.C.R. at 13308 ¶ 23. In 2004, however, the FCC concluded that "any such interpretation is no longer good law." *In Re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4980 ¶ 12 (2004) ("Golden Globe Order"). In that order, the FCC provided the following explanation for its new approach to broadcast indecency regulation:

> The "F-Word" is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image. The use of the "F-Word" here, on a nationally telecast awards ceremony, was shocking and gratuitous. In this regard, NBC does not claim that there was any political, scientific or other independent value of use of the word here, or any other factors to mitigate its offensiveness. If the Commission were routinely not to take action against isolated and gratuitous uses of such language on broadcasts when children were expected to be in the audience, this would likely lead to more widespread use of the offensive language. Neither Congress nor the courts have ever indicated that broadcasters should be given free rein to air any vulgar language, including isolated and gratuitous instances of vulgar language.

Id. at 4979 ¶ 9. Based on this rationale, the FCC held that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding

that material that is otherwise patently offensive to the broadcast medium is not indecent." *Id.* at 4980 ¶ 12.

Elaborating on the above explanation from the *Golden Globe Order*, the *Remand Order* expressly articulated several reasons for the FCC's new approach to broadcast indecency regulation, including the following:

- "To begin with, any strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend derives from its sexual or excretory meaning.
- "Moreover, in certain cases, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions."
- "Finally, and perhaps most importantly, categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context. In evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination. To the extent that Commission dicta had previously suggested that one of these factors—whether material had been repeated— would always be decisive in a certain category of cases, . . . such dicta was at odds with the Commission's overall enforcement policy and was appropriately disavowed."

Remand Order, 21 F.C.C.R. at 13308 ¶ 23. Thus, the FCC's clearly articulated reasons for changing its approach to broadcast indecency regulation focused not solely, or even primarily, on the "first blow" theory but on the desire for consistency with its overall indecency enforcement policy through a context-based approach.

Only after providing the above rationale did the FCC "[t]urn[] back to" the specific broadcast at issue to discuss the impact of "'the first blow' to the television audience *in the circumstances presented here*." *Id.* at 13308 ¶ 24 (emphasis added). Such language supports the understanding that the FCC's primary purpose in changing its policy was not to prevent the "first blow" at all times, but rather to allow the Commission to assess indecency on the basis of the overall context of individual broadcasts, in which the harm of the "first blow" is merely one of the relevant factors. As the discussion within the *Remand Order* makes plain, the FCC analyzed language that was broadcast within a given context—the Billboard Music Awards Show—and simply concluded that, *in that context*, the harm of the "first blow" constituted one of the factors resulting in a finding of indecency. Nowhere did the FCC articulate the "first blow" as the sole or primary basis for its policy change such that all fleeting expletives are now actionably indecent. Instead, it explained that the impact of the "first blow" occasioned by the use of a single expletive *in some contexts* prevented the agency from "granting an *automatic exemption* for 'isolated or fleeting' expletives . . . ." *Id.* at 13309 ¶ 25 (emphasis added).

Thus, the Second Circuit failed to correctly identify the stated reasons for the FCC's change in broadcast indecency regulation and consequently failed to

properly analyze those reasons under the relevant standards of the APA.

B. The FCC's stated rationale for its policy change was not arbitrary or capricious.

Section 706 of the APA limits the scope of judicial review of agency decisions. *See* 5 U.S.C. § 706. Specifically, § 706(2)(A) provides that "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." As this Court previously has observed, under the APA's "arbitrary and capricious" standard, "the scope of review . . . is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.*

If, however, the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" *id.* (citations omitted), the agency's decision must stand. The FCC's decision to regulate all broadcast indecency according to a context-based approach, in which repetition (or lack of repetition) of indecent material is not dispositive but is simply one factor for consideration, is entirely rational and therefore satisfies these standards. Indeed, this Court has acknowledged that "[i]t is a characteristic of speech such as this that both its capacity to offend and its 'social value,' . . . vary

with the circumstances." *Pacifica*, 438 U.S. at 747. The FCC's new broadcast indecency policy merely allows the Commission to base its determinations on all of the relevant circumstances.

The FCC's previous approach to indecency regulation provided that expletives had to be repeated to be actionably indecent, while a single description or depiction of sexual or excretory functions was sufficient to find indecency. *See Remand Order*, 21 F.C.C.R. at 13306-07 ¶ 20-21 (citing *Pacifica Found., Inc., Memorandum Opinion and Order*, 2 F.C.C.R. 2698, 2699 (1987) ("Pacifica Opinion & Order"); *Golden Globe Order*, 19 F.C.C.R. at 4980 ¶ 12; and subsequent Bureau-level decisions). As the FCC articulated in the *Remand Order*, however, "any strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend derives from its sexual or excretory meaning." 21 F.C.C.R. at 13308 ¶ 23.

As early as the 1970s, the Commission concluded that seven expletives, including the "F-word" and the "S-word," "depict sexual and excretory activities and organs . . . ." *Pacifica Order*, 56 F.C.C.2d at 99 ¶ 14. Based on this conclusion, and following this Court's *Pacifica* decision, the FCC adopted an "indecency definition, which since [that time] has involved the description of sexual or excretory organs or activities." *Remand Order*, 21 F.C.C.R. at 13308 ¶ 23. In the *Golden Globe Order*, the FCC again explained that "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation." 19 F.C.C.R. at 4978 ¶ 8. Given the underlying definitions of expletives, the

Commission's conclusion—that there is no "strict dichotomy" between the use of expletives as intensifiers and their literal use—is wholly rational. Indeed, on what basis, other than their actual meanings and attendant connotations, do any words possess the power to offend?

In further support of its changed indecency regulation policy, the FCC recognized the reality that "*in certain cases*, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions." *Remand Order*, 21 F.C.C.R. at 13308 ¶ 23 (emphasis added). While such situations may be infrequent, their occurrence underscores the reasonable nature of the Commission's decision to adopt a policy that allows it to determine whether material is indecent by assessing each broadcast based on its individual context. In cases presenting this difficulty, a contextual approach is inherently more workable than any bright-line or *per se* rule dictating a pre-determined outcome, and will undoubtedly permit the Commission to more accurately distinguish material that is indecent from that which is not.

Yet another, "and perhaps [the] most important[]," reason for the policy change, as articulated by the Commission, is the agency's recognition of a need for consistency. *See id.* As the FCC observed, "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." *Id.* (citing FCC, *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999,

8002-03 ¶ 9 (2001) ("Indecency Policy Statement") ("In determining whether material is patently offensive, the *full context* in which the material appeared is critically important") (emphasis in original)).

FCC publications since 1970 evidence the Commission's traditional focus on the importance of context. *See, e.g., In Re WUHY-FM, Eastern Educ. Radio*, 24 F.C.C.2d 408, 410, 412 ¶¶ 6, 8 (1970) ("[T]he issue here does not involve presentation of a work of art or on-the-spot coverage of a bona fide news event . . . [but includes] an expression which conveys not [sic] thought, has no redeeming social value, and in the context of broadcasting, drastically curtails the usefulness of the medium for millions of people"); *Pacifica Opinion & Order*, 2 F.C.C.R. at 2699 ¶ 13 ("[S]peech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium"); *In Re Infinity Broad. Corp. of Pennsylvania (WYSP(FM))*, 3 F.C.C.R. 930, 932 ¶ 14 (1987) ("There is no way to construct a definitive list [of patently offensive words and depictions] that would be both comprehensive and not over-inclusive in the abstract, without reference to the specific context").

In its most recent Indecency Policy Statement, intended to "provide guidance to the broadcast industry regarding . . . enforcement policies with respect to broadcast indecency," 16 F.C.C.R. at 7999 ¶ 1, the FCC listed several "principal factors" the Commission considers significant in determining whether broadcast material is indecent. The FCC again emphasized that "[e]ach indecency case presents its own particular mix of these, and possibly other,

factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent. No single factor generally provides the basis for an indecency finding." *Id.* at 8003 ¶ 10. Significantly, this Court previously has approved the FCC's decision to make determinations based on specific factual contexts, recognizing that such an "approach is appropriate for . . . the Commission when regulation of indecency is at stake, for *indecency is largely a function of context . . .*" *Pacifica*, 438 U.S. at 742 (emphasis added).

Despite this traditional focus on overall context, the Commission's statement in the *Pacifica Opinion & Order* distinguishing the bare use of an expletive from a depiction of sexual or excretory activity, as well as a number of subsequent Bureau-level decisions, *see Golden Globe Order*, 19 F.C.C.R. at 4981 ¶ 12 n. 32, resulted in an understanding that one factor—"whether material had been repeated—would always be decisive in a certain category of cases." *Remand Order*, 21 F.C.C.R. at 13308 ¶ 23. The FCC's recognition that such an approach represented a detour from its longstanding context-based method of indecency regulation, *see id.*, and the agency's express desire to return to a uniform indecency enforcement regime, in which it "examine[s] *all* factors relevant to that determination," *id.* (emphasis added), are rational and were sufficiently articulated to preclude a court from overturning the change.

This Court need not agree with the judgment calls made pursuant to an agency policy to uphold that policy as a valid exercise of the agency's discretion. Indeed, as previously noted, this Court's precedents make clear that such a substitution of a court's

judgment for agency expertise constitutes judicial error. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Despite the Second Circuit's contrary conclusion, the FCC has provided "a reasoned explanation" for its "180-degree turn regarding its treatment of 'fleeting expletives.'" *Fox Television Stations, Inc.*, 489 F.3d at 455. Even if the Second Circuit's confusion suggests that this was an agency "decision of less than ideal clarity," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, this Court has explained that it "will . . . 'uphold [such] a decision . . . if the agency's path may reasonably be discerned.'" *Id.* (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). At a minimum, the FCC's articulation of its policy change satisfies this standard of clarity such that it should be upheld under the "arbitrary and capricious" standard set forth in § 706 of the APA.

III. THE FCC'S CONTEXT-BASED APPROACH ALLOWS IT TO PROTECT THE RIGHTS OF ADULTS AND SIMULTANEOUSLY FURTHER ITS COMPELLING INTEREST IN PROTECTING CHILDREN.

The FCC's context-based approach to indecency regulation is preferable to application of a bright-line rule regarding "fleeting expletives" because it allows the Commission to respect the First Amendment rights of adults without compromising its compelling interest in protecting children from harmful material. As explained in Section I, *supra*, this Court's decisions repeatedly have recognized the FCC's interest in regulating the broadcast of indecent material during times when children are most likely to be in the

audience. *See, e.g., Denver Area Educ. Telecomms. Consortium, Inc.*, 518 U.S. at 743; *Pacifica*, 438 U.S. at 734, 749-50. At the same time, however, this Court has generally cautioned that when rights protected by the First Amendment are at stake, "the government may not 'reduce the adult population . . . to . . . only what is fit for children." *Butler*, 352 U.S. at 383.

The FCC's new broadcast indecency policy will have no such result. For example, in 2005, the Commission determined that broadcasting the unedited version of the World War II movie *Saving Private Ryan* outside the safe harbor period was not actionable because "the material, *in context*, is not patently offensive, and therefore, not indecent." *In Re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4510 ¶ 8 (emphasis added). Although the film as broadcast included the use of numerous expletives and other generally offensive language, the Commission's context-based approach to indecency regulation allowed it to consider all of the relevant factors and conclude that

> in context, the dialogue, including the complained-of material, is neither gratuitous nor in any way intended or used to pander, titillate or shock. Indeed, it is integral to the film's objective of conveying the horrors of war through the eyes of these soldiers, ordinary Americans placed in extraordinary situations. Deleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and

> diminished the power, realism and immediacy of the film experience for viewers.

Id. at 4512-13 ¶ 14. The Commission's new policy will not affect the ability of adults to continue to access such material during the safe harbor period and, as the *Saving Private Ryan* decision demonstrates, even prior to that time if the overall context indicates that the material is not patently offensive, as, for example, when it has been used for a legitimate artistic, historical, political or scientific purpose rather than simply to "pander, titillate or shock."

Any concern that the new policy may lead to self-censorship by broadcasters is easily answered by this Court's recognition in *Pacifica* that the Commission's definition of indecency will "deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern." 438 U.S. at 743. Furthermore, the *Pacifica* Court's assessment of the effect of the FCC's indecency definition applies with equal force to the Commission's new policy, since it continues to apply precisely the same definition:

> A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

Id. In recognition of the principle that "[i]nvalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a last resort,'" *id.*, the *Pacifica* Court "decline[d] to administer that medicine

to preserve the vigor of patently offensive sexual and excretory speech." *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). This Court should likewise decline to invalidate the FCC's indecency regulation policy on the basis of unfounded speculation about its hypothetical consequences.

While regulating all indecency—including "fleeting expletives"—on a contextual basis will interfere insignificantly, if at all, with the right of adults to continue to access adult-appropriate material, such a policy will allow the FCC to afford greater protection to children when they are likely to comprise a significant portion of the broadcast audience. Continued application of the FCC's previous bright-line approach, in which the repetition of the non-literal use of an expletive was a prerequisite to a finding of indecency, would require the FCC to ignore the harm to children any time such an expletive is used in isolation, regardless of the graphic or offensive nature of the utterance. The FCC should not be forced to provide "an automatic exemption for 'isolated or fleeting' expletives," 21 F.C.C.R. at 13309 ¶ 25. Rather, given its expertise in the area of indecency regulation, and in accordance with this Court's concern that broadcasting indecency has the ability to "enlarge[] a child's vocabulary in an instant," *Pacifica*, 438 U.S. at 749, the FCC should be free to exercise its discretion so as to protect children when the harm of exposure to such material outweighs other relevant contextual factors.

CONCLUSION

This Court should reverse the Second Circuit's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Petitioners,

—v.—

FOX TELEVISION STATIONS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, DIRECTORS GUILD OF AMERICA, FIRST AMENDMENT PROJECT, MINNESOTA PUBLIC RADIO/AMERICAN PUBLIC MEDIA, NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE, NATIONAL COALITION AGAINST CENSORSHIP, NATIONAL FEDERATION OF COMMUNITY BROADCASTERS, PEN AMERICAN CENTER, AND WASHINGTON AREA LAWYERS FOR THE ARTS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

Amici are a diverse group of media, arts, and advocacy organization concerned about free expression in broadcasting. Their individual statements of interest are set out in an appendix to this brief.

STATEMENT OF THE CASE

This case arose in 2006 after the Federal Communications Commission issued an "*Omnibus Order*" resolving dozens of indecency complaints that it received between 2002 and 2005. The agency found ten broadcasters guilty of indecency and six also guilty of profanity; it imposed "forfeitures" against six of the ten.[2] The other four indecency/profanity findings were unaccompanied by forfeitures because they were based on a new rule, announced in 2004, that presumptively bans even one "fleeting expletive" from the airwaves.[3] Since the broadcasters in these

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

[2] 18 U.S.C. 1464, the basis of the FCC's authority to censor, bars "obscene, indecent, or profane language by means of radio communication."

[3] The fleeting expletives rule was first announced in *"Golden Globe Awards,"* 19 FCC Rcd 4975 (2004). The FCC applied the

four cases could not have known that a single vulgar word in a program would be considered unlawful, the FCC imposed no fine, and there was accordingly no avenue of appeal within the agency. The broadcasters petitioned for review in the U.S. Court of Appeals for the Second Circuit.

The FCC requested a remand so that it could further consider the four cases. The court of appeals obliged, meanwhile ordering a stay of the fleeting expletives rule. On remand, the FCC changed its mind about two of the programs – episodes of "NYPD Blue" and "The Morning Show" – and affirmed its rulings against the other two: Billboard Award shows from 2002 and 2003.

The court of appeals held that the fleeting expletives rule was arbitrary and capricious, in violation of the Administrative Procedure Act. The court found that the FCC had not given a reasonable explanation for its dramatic change in policy – from its many statements over the years that a mere fleeting expletive would not be sufficient for an indecency finding, to a wholesale reversal in 2004, announcing that a single vulgarity (in particular, any variant of the words "shit" or "fuck") is presumptively both indecent and profane.

The court of appeals found that the FCC's main justification for its new rule – that minors must be shielded from the "first blow" of a vulgar word – is irrational, in part because the agency had already

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rule in its *Omnibus Order* even though an administrative appeal of *Golden Globe* was still pending. See Pet. App. 13a.

made exceptions that allowed a "first blow" to occur: for the film "Saving Private Ryan," because of its artistic merit; for "The Early Show" (after remand), because of its status as a news interview; and indeed, for news broadcasts about this very litigation. Pet. App. 25a-28a.[4]

In extensive dicta, the court of appeals expressed doubt that any explanation for the fleeting expletives rule would pass constitutional muster.[5] It noted that speech covered by the FCC's indecency policy "is fully protected by the First Amendment." *Id.*, 35a-36a. Pointing to the many inconsistencies and subjective elements of Commission decision-making, the court concluded that the indecency test "is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." It "fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to 'steer far wider of the unlawful zone.'" *Id.*, 36a-37a (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

The court of appeals found persuasive precedent in *Reno v. ACLU*, 521 U.S. 844, 874 (1997), which, it said, held the indecency standard – adopted by Congress to regulate the Internet – to be unconstitutionally vague. The court was "skeptical

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[4] The court also ruled that the Commission's new approach to profanity was irrational, Pet. App. 33a – a conclusion that the government does not appear to contest.

[5] The court explained that addressing the constitutional issues would serve judicial economy by guiding the FCC's deliberations on remand.

that the FCC's identically-worded indecency test" for broadcasting could "provide the requisite clarity to withstand constitutional scrutiny." Indeed, the Second Circuit said, "we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecency." Pet. App. 37a-38a. The court remanded the case to the Commission for further review.

Judge Leval dissented with respect to the Administrative Procedure Act, but did not take issue with the court's constitutional analysis. Indeed, he argued that "[i]f there is merit in the majority's argument that the Commission's actions are arbitrary and capricious because of irrationality in its standards for determining when expletives are permitted and when forbidden, this argument must be directed against the entire censorship structure." *Id.*, 54a.

In its petition for certiorari, the FCC acknowledged that "[i]n most cases, a remand to an agency for a fuller explanation of a policy would not merit this Court's review." But, it said, the court of appeals' *dicta* – analyzing why the Commission would not be able to surmount the constitutional hurdles – made the remand into "a Sisyphean errand." Pet. 15. The FCC asserted that the appeals court not only deprived it of power to enforce the fleeting expletives rule; it "call[ed] into serious question the Commission's authority to regulate even *repeated* uses of offensive sexual or excretory language." Certiorari was essential because the Commission was now "in an untenable position,"

without "any permissible scope" to regulate indecency. *Id.*, 27, 29-30.

SUMMARY OF ARGUMENT

Having sought Supreme Court review solely because the court of appeals' First Amendment analysis created a "Sisyphean errand" and put the agency "in an untenable position," the FCC now argues that the Court must avoid all constitutional questions. But the FCC cannot have it both ways. Deciding whether agency action is arbitrary and capricious in violation of the Administrative Procedure Act necessarily encompasses an inquiry into the constitutional implications of the agency's interpretation of its governing statute, and an analysis of the proper limitations of that statute.

Like all federal laws, 18 U.S.C. § 1464 must be construed to avoid constitutional difficulties. Where free speech is at risk, regulatory agencies must act with caution. Whether the fleeting expletives rule – and indeed, the entire indecency regime – is permitted by section 1464, or is arbitrary and capricious within the meaning of the APA, are questions that inevitably have constitutional dimension.

The FCC's conduct in the thirty years since *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978), narrowly permitted censorship of "indecency" has been unpredictable, at times sweeping, and highly subjective. The problem intensified in 2004 after the Commission announced that even one "fleeting expletive" was now, in most

circumstances, barred from the airwaves; then applied that new rule to reverse its previous decision that the rock star Bono's single exclamation ("fucking brilliant!") was enough to make a Golden Globe Awards program unlawfully indecent and profane. In the next two years, the agency made additional arbitrary judgments, finding no indecency in the movie "Saving Private Ryan," with its many expletives, but condemning the Martin Scorsese documentary, "The Blues" because of vulgar words used by musicians and their music industry colleagues. Thirty years of such discretionary and inconsistent decision-making compels the conclusion that the entire indecency regime is vague, arbitrary, capricious, and overbroad. The fleeting expletives rule in particular has had a widespread chilling effect on valuable programming. And the unconstitutionality of the present system is not remedied by the existence of a late-night "safe harbor" for possibly indecent programs.

The Court in *Pacifica* accepted the FCC's broad reading of 18 U.S.C. § 1464 because it found broadcasting to be "uniquely pervasive" and "uniquely accessible to children." *Id.*. at 748-49. But given the FCC's history of vague and unpredictable enforcement, the Court's recent condemnations of the indecency test, and technological developments since *Pacifica*, the Commission's reading of section 1464 is no longer constitutionally viable.

In *Reno v. ACLU*, the Court condemned the indecency test as both vague and overbroad. Although stopping just short of a holding on vagueness, the Court vividly outlined the evils of

essentially standardless indecency enforcement. It then struck down the indecency test on grounds of overbreadth. The only factor distinguishing the FCC's indecency regime from the unconstitutional enforcement scheme in *Reno* was the perceived invasiveness of broadcasting, against a general background of regulation justified by the scarcity of the airwaves. *Reno,* 521 U.S. at 868-70.

Technological developments since *Pacifica,* however, indicate that the rationale for censorship of nonobscene broadcasting has lost whatever persuasive force it once may have had. Given cable television, the Internet, and other electronic media today, broadcasting is no longer "uniquely pervasive" and "uniquely accessible to children." This case does not address the Commission's power to regulate broadcasting in structural, content-neutral ways, or even to impose affirmative requirements that do not directly censor protected speech. But 18 U.S.C. § 1464 can no longer be construed to authorize content-based censorship of particular words, or of other material that a federal agency finds "patently offensive," unless it meets the constitutional standard for obscenity.

New technologies have also created less burdensome alternatives to government censorship for parents who wish to shield their children from vulgar language or images on the airwaves. Hence, whether or not First Amendment strict scrutiny applies to the FCC's indecency regime, it is, today, an overly restrictive remedy for speech that some viewers and listeners find offensive.

ARGUMENT

I. THE FCC CANNOT AVOID THE CONSTITUTIONAL ISSUES THAT ARE AT THE HEART OF THIS CASE

The petition for certiorari turned entirely on the court of appeals' First Amendment analysis. The FCC acknowledged that the case would not otherwise merit Supreme Court review. It urged review because the court of appeals' constitutional *dicta* made an administrative remand futile.

Now, however, the agency asks the Court to ignore the First Amendment and focus narrowly on whether it gave a reasoned explanation for its fleeting expletives rule. The Commission wants the Court to decide only such limited linguistic questions as whether it was within agency discretion to determine that the common words "fuck" and "shit" always have sexual or excretory "connotations."

But the First Amendment is at the core of this case. Courts must construe statutes and regulations to avoid constitutional difficulties. A necessary corollary of this rule of statutory construction is that courts cannot defer to claims of agency expertise – linguistic or otherwise –where constitutional rights hang in the balance.

In *National Labor Relations Bd. v. Catholic Bishop of Chicago*. 440 U.S. 490, 500 (1979), the Court summarized the rule: laws "ought not be construed to violate the Constitution if any other possible construction remains available." This principle is especially important where free

expression is at risk, because "[t]he values enshrined in the First Amendment plainly rank high 'in the scale of our national values.'" *Id.* at 501 (quoting *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17 (1963)). In *Catholic Bishop*, the Court engaged in a full-scale constitutional analysis before concluding that a likelihood of excessive church-state entanglement required it to reject the relevant administrative agency's construction of its governing statute, and to interpret the statute not to authorize agency jurisdiction over church schools.

The Court followed *Catholic Bishop* in *Rust v. Sullivan*, 500 U.S. 173, 190 (1991), and as in *Catholic Bishop*, the constitutional analysis focused on agency regulations. Although the *Rust* Court ultimately determined that it was not necessary to "invalidate the regulations in order to save the statute from unconstitutionality," 500 U.S. at 191, it recognized the need to undertake that inquiry. See also *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) ("the elementary rule is that every reasonable construction must be resorted to, in order to *save a statute* from unconstitutionality'") (quoting *Hooper* v. *California*, 155 U.S. 648, 657 (1895)).

Careful constitutional scrutiny of the current indecency regime is likewise required in this case. The meanings of "indecent" in 18 U.S.C. § 1464, and of "arbitrary and capricious" in the Administrative Procedure Act, are necessarily informed by the limits that the First Amendment places on both

legislation and agency discretion. As section II below demonstrates, the FCC's sweeping assertion of wholly discretionary power to make judgments about artistic necessity, news value, and other matters that it is no business of government to determine goes way beyond anything approved in *Pacifica* and raises the gravest of doubts as to the constitutionality of the indecency regime.

The FCC's argument for judicial deference to its claimed expertise is likewise misplaced. Questions of linguistics, newsworthiness, and aesthetic value are not within the agency's expertise, nor should they be, given the constitutional ramifications. As the Court explained in *DeBartolo*, although agency interpretations "would normally be entitled to deference," this is not so where the agency's construction "would raise serious constitutional problems." 485 U.S. at 574-78.

The FCC's attempt to avoid the First Amendment is particularly misplaced given its heavy reliance on *Pacifica* to defend its "contextual" decision-making. To evaluate this reliance on *Pacifica*, the Court must address the meaning of that narrow and fractured ruling, and its application to today's very different culture and technology.

II. THE FCC'S ASSERTION OF BROAD, DISCRETIONARY CENSORSHIP POWER UNDER 18 U.S.C. §1464 CREATES INSURMOUNTABLE CONSTITUTIONAL PROBLEMS

A. FCC Enforcement Since *Pacifica* Has Been Unpredictable, Inconsistent, and Highly Subjective

1. The indecency regime, culminating in the new "fleeting expletives" rule, has not been narrow and restrained, as contemplated by Pacifica

In 1978, a bare majority of the Court approved the FCC's censorship of "indecent" speech on the airwaves, in the context of the "verbal shock treatment" of one satiric monologue. *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). The decision turned on a very lenient standard of First Amendment scrutiny, applicable to broadcasting, the Court said, largely because it is "uniquely pervasive" and "uniquely accessible to children." *Id.* at 748-49.

The Court in *Pacifica* emphasized the "narrowness" of the holding. *Id.* at 750-51; see also *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983). This narrowness was important, given the breadth of the agency's definition of indecency, which remains unchanged today: "language that describes, in terms patently offensive as measured by contemporary community standards

for the broadcast medium, sexual or excretory activities and organs." *Pacifica*, 438 U.S.at 732.

For the next nine years, the FCC followed the restrained enforcement policy that it had promised the Court in *Pacifica*. Pet. App. 6a-12a. In 1987, however, it expanded its indecency regime to embrace any sexual innuendo or other content that the commissioners considered offensive, regardless of whether there was "verbal shock treatment." Two of the three programs condemned under this new "generic" indecency standard had aired on noncommercial radio stations; one concerned homosexuality and AIDS. *New Indecency Enforcement Standards*, 2 FCC Rcd 2726 (1987): *Pacifica Foundation*, 2 FCC Rcd 2698 (1987); *Regents of the U. of California*, 2 FCC Rcd 2703, on reconsideration, 3 FCC Rcd 930 (1987).[6]

The agency's indecency enforcement between 1987 and 2003 was unpredictable and sporadic. In 2001, it ruled that the African-American poet and theater artist Sarah Jones's "Your Revolution," broadcast on a noncommercial community station, was indecent. "Your Revolution" is a poetic protest against misogyny in hip-hop music. The FCC's decision was tone-deaf to the relevance of Jones's work to African-American women. After Jones sued,

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[6] The new generic standard was a response to pressure from Morality in Media and other groups to reverse the Reagan Administration's "laissez faire" approach to indecency. *See* John Crigler & William Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329 (1989).

and just before the FCC's brief was due in the court of appeals, the agency reversed itself and decided that the poem was not indecent after all, thereby mooting Jones's challenge to the indecency standard. *KBOO Foundation*, 18 FCC Rcd 2472 (2003).

Up to this point, the FCC did not consider "fleeting expletives" indecent. It changed its policy after two incidents: the musician Bono's exclamation, "this is really fucking brilliant" at the 2003 televised Golden Globe Awards ceremony and, a few months later, the singer Janet Jackson's "wardrobe malfunction" at the February 2004 Super Bowl half-time show.

The FCC initially ruled that Bono's exclamation was not indecent because it did not refer to sexual or excretory functions. *Complaints Against Various Licensees Regarding Their Airing of the "Golden Globe Awards,"* 18 FCC Rcd 19859 (2003). However, a month after the Super Bowl incident, and quite plainly in response to the ensuing political uproar, the agency reversed gears and announced that all uses of the words "fuck," even fleeting exclamations, necessarily refer to sex and therefore are presumptively indecent. The commissioners asserted that even though Bono used "fucking" as "an intensifier," not a sexual reference, any use of the word, or a variation, "invariably invokes a coarse sexual image." Previous agency rulings to the contrary were "no longer good law." *"Golden Globe Awards,"* 19 FCC Rcd 4975, 4978-79 (2004).

In an even more dramatic departure from prior practice, the FCC also ruled that Bono's

exclamation was profane. Until *Golden Globe*, the agency had understood "profanity" to have a religious dimension. See Pet. App. 13a. In *Golden Globe*, however, it rejected all of its previous statements on the subject, and created a vague new profanity definition that essentially overlapped with the new fleeting expletives rule – "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Golden Globe*. 19 FCC Rcd at 4981.

It was not long after the FCC created these new rules that it announced an exception for the film "Saving Private Ryan," broadcast by many ABC stations on Veterans Day in 2004. Complaints had cited dialogue including "'fuck,' and variations thereof; 'shit,' 'bullshit,' and variations thereof, 'bastard,' and 'hell,'" as well as "Jesus" and "God damn." *Complaints Against Various Licensees Regarding Their Broadcast of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507, 4509 (2005). The Commission found that the material, "in context, is not patently offensive and therefore, not indecent," or profane. *Id.* at 4510. The reason was that the rough language was "integral to the film's objective of conveying the horrors of war through the eyes of these soldiers," and that deleting or bleeping "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." *Id.* at 4512-13.

This sensitivity to "the nature of the artistic work" did not extend, a year later, to the FCC's March 2006 *Omnibus Order*, which condemned a PBS documentary "The Blues," directed by Martin

Scorsese, because of expletives. The commissioners refused to apply the "Saving Private Ryan" exception to "The Blues" because, they said, "we do not believe" that the station that aired the show "has demonstrated that it was essential to the nature of an artistic or educational work ... or that the substitution of other language would have materially altered the nature of the work." *Omnibus Order*, 21 FCC Rcd 2664, 2685-86 (2006), J.A. 76.[7]

The *Omnibus Order* addressed dozens of other programs containing coarse language or sexual situations. Non-explicit suggestions of teenagers' sexual activity were indecent in the CBS program "Without a Trace"; but explicit discussions of teen sex on "Oprah" were not. *Id.* at 2705-09, J.A.123-24; *Complaints Against Various Licensees Concerning Their December 31, 2004 Broadcast of "Without a Trace,"* 21 FCC Rcd 2732 (2006).[8] Fleeting expletives by celebrities at Billboard Award shows were indecent and profane; expletives on other shows, including "Fuck Cops!" (visible on graffiti), "pissed off," "up yours," "kiss my ass," and "wiping his ass" were not. 21 FCC Rcd at 2690-95, 2709-13, J.A. 86-98, 132-40.

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[7] Commissioner Adelstein dissented because the "coarse language is a part of the culture of the individuals being portrayed," and "if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary." J.A. 173.

[8] *Without a Trace* was the subject of a separate ruling issued on the same date as the Omnibus Order.

The *Omnibus Order's* evaluation of "NYPD Blue" provided a striking (if amusing) example of unbridled subjectivity. The commissioners decided that "bullshit" (uttered by the one character) was profane and indecent, but "dick" and "dickhead" were not. *Id.* at 2699-2700, J.A. 98-103. Why? According to the FCC, "bullshit, ...whether used literally or metaphorically, is a vulgar reference to the product of excretory activity and therefore falls within the first prong of our indecency definition." And it is patently offensive (the second prong of their definition) because the "S-Word" (again, whether used literally or not) is "one of the most vulgar, graphic and explicit descriptions of excretory activity in the English language." J.A. 101. "Dickhead," by contrast, was not "patently offensive" to them for the circular reason that it was "not sufficiently vulgar, explicit, or graphic." J.A. 100.

The FCC's most recent intellectual acrobatics came after this case was remanded for reconsideration of the four indecency and profanity rulings that were before the court of appeals. The agency dismissed the case against "NYPD Blue" on a technical ground (the complainant did not reside in the time zone where the broadcast occurred). And it reversed itself on the utterance of "bullshitter" in "The Early Show" because, it now said, the show was a news interview, a context where government should defer to producers' editorial judgment. But this deference was as vague and unpredictable as everything else in the FCC's censorship domain: the commissioners warned that "there is no outright news exemption from our indecency rules."

Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-166 (Nov. 6, 2006) ("Remand Order"), Pet. App. 127a.

The unavoidable conclusion from even this brief review of indecency enforcement since *Pacifica* – and in particular since announcement of the fleeting expletives rule – is that the FCC's conduct has been woefully inconsistent – characterized by unpredictable detours and unprincipled reversals. 18 U.S.C. § 1464, interpreted as it must be to avoid First Amendment difficulties, does not permit this situation to continue.

2. The FCC's unbridled discretion in deciding whether a program is "patently offensive," and its second-guessing of the artistic judgments of filmmakers and programmers, are classic hallmarks of an unconstitutional censorship system

The FCC's record of enforcement demonstrates the evils of a vague, overly discretionary censorship regime. As the court of appeals noted, the agency's subjective judgments embody the same arbitrariness and unpredictability that led to invalidation of licensing schemes in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); see Pet. App. 39a. Indeed, the indecency regime outdoes the licensing processes in these cases in the sheer breadth of the agency's claim of discretion to decide what, in the personal judgment

of the commissioners, is patently offensive and what has sufficient artistic necessity, news value, or other merit to escape punishment.

With its contrasting decisions on "Saving Private Ryan," "The Blues," "The Early Show," and many other programs at issue in the *Omnibus Order*, the FCC has appointed itself the arbiter of both news value and artistic necessity. Under our constitutional system, it is not the place of government officials to second-guess artistic or editorial judgments. See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (broadcasters' decisions "should be left to the exercise of journalistic discretion"); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-258 (1974) (protecting newspaper's exercise of editorial judgment).[9] It is the writer, artist or filmmaker who decides what is artistically necessary in a creative work. The question "What is art?" is one of the oldest in human history. Considering the diverse attempts to define it – from Tolstoy's essay *What is Art?* to the Dada movement's "Anything is art if an artist says it is"[10] – the inherent subjectivity

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[9] The sole exception is obscenity law, where "serious value" is part of the three-part test for determining whether a work is constitutionally protected in the first place. *Miller v. California*, 413 U.S. 15, 24 (1973). Once expression *is* constitutionally protected, government officials cannot ban or burden content they dislike based on their assessments of artistic value or necessity. *Winters v. New York*, 333 U.S. 507, 510 (1948). Of course, government makes judgments about artistic value in awarding prizes, *e.g.*, *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) – a context not relevant here.

[10] LEO TOLSTOY, WHAT IS ART? (1897); MUSEUM OF MODERN ART, THREE GENERATIONS OF TWENTIETH-CENTURY ART (1972)

of the task alone makes it inappropriate for a government agency.

The FCC's disparate treatment of "The Blues" – an educational film portraying the actual figures who influenced a significant element of America's culture and musical history – and "Saving Private Ryan" – a violent film with fictional characters – is a striking illustration of the unbridled discretion that the agency claims. Although the Commission found variants on "fuck" and "shit" to be indecent in "The Blues," it absolved the far more frequent use of those words in "Saving Private Ryan" because it thought editing "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." It is unclear how the Commission arrived at these contrary conclusions. One possible explanation is that the cultural milieu of the mainstream movie "Saving Private Ryan" was more familiar to the commissioners than the largely African-American background of "The Blues." A similar dynamic can be seen in the Commission's earlier finding of indecency against Sarah Jones's "Your Revolution" – a poem that speaks most directly to African-American women. Thus, even without intending any racial or ethnic bias, decisionmakers in a subjective and discretionary censorship system may be more likely to find "patently offensive" those cultural expressions with which they are unfamiliar.

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48 (quoting Marcel Duchamp), *excerpt reprinted at* www.moma.org/collection/browse_results.php?object_id=81631 (visited 11/6/06).

Like any overly discretionary censorship system, the FCC's indecency regime deploys a cultural bias that favors mainstream values at the expense of constitutionally protected but less mainstream speech. From its censorship in 1987 of a program dealing with homosexuality and AIDS to its tone-deafness to the educational and artistic value of authentic colloquial language in "The Blues," the Commission's thirty years of indecency enforcement have borne out Justice Brennan's warning that allowing a government agency to ban what it considers "patently offensive" represents "an acute ethnocentric myopia" that has no place in our "land of cultural pluralism," where "there are many who think, act, and talk differently" from the commissioners of the FCC. *Pacifica*, 438 U.S. at 775 (Brennan, J., dissenting).

The FCC's attempted distinctions among various vulgar words in its *Omnibus* and Remand Orders provide further examples of unbridled discretion. Whether "dickhead" or "pissed off" are more or less offensive than "bullshit" is a matter of taste, and the commissioners' efforts to support their particular tastes only demonstrate the arbitrary nature of the enterprise. The Remand Order reversal on the use of "bullshitter" in "The Early Show," similarly, confuses rather than clarifies the agency's shifting standards. By changing its mind about its original indecency and profanity ruling but simultaneously warning that "there is no outright news exemption from our indecency rules," the FCC leaves news broadcasters in as much limbo as documentary and feature producers as to when it

might find an exception to the fleeting expletives rule.

The FCC further assumes the linguistic expertise to decide that fleeting expletives – in particular, "fuck," "shit," and their many compounds and variations – always refer to sexual or excretory activities or organs even when they are only used for color or intensity. But as "The Blues" and many other documentary films demonstrate, these words have many nonsexual and nonexcretory meanings. The court of appeals noted that "even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced 'sexual or excretory organs or activities.'" Pet. App. 29a (citing President Bush's remark to British Prime Minister Blair that the UN should "get Syria to get Hezbollah to stop doing this shit," and Vice President Cheney's widely-reported "Fuck yourself" to Senator Patrick Leahy on the Senate floor). The FCC's effort to elide this distinction by arguing that there is always a sexual or excretory "connotation" stretches its own definition of indecency (reference to sexual or excretory activities or organs) to the breaking point.

Scholarship supports the conclusion that expletives not only have a multitude of nonsexual or excretory meanings; they often have serious value. As Professor Timothy Jay explains, expletives are used for emphasis and emotive charge; they serve psychological and social purposes and communicate powerful messages wholly apart from their more literal meanings. Timothy Jay, WHY WE CURSE (2000).

In 2004, Professor Jay submitted expert testimony in an FCC case involving a radio documentary, "Movin' Out the Bricks," which explored the lives of Chicago public housing residents, including one woman who described drug use as getting "fucked up and shit like that." Jay explained that in many contexts, "fuck" and "shit" are part of ordinary conversation and have no sexual or excretory connotation. In this case, they were essential to the documentary's authenticity. To clean up the woman's language would "undermine the listeners' understanding of the impact of public housing ... If we substitute *inebriated* for *fucked up*, we erase the emotional impact." Timothy Jay, Statement of Expert Opinion, *WBEZ-FM*, No. EB-04-IH-0323, (Sept. 21, 2004).[11]

Among the diverse nonsexual meanings of "fuck" and its compounds, Jay offered the terms "FUBAR" ("fucked up beyond all recognition") and "SNAFU" (U.S. Army slang for "situation normal all fucked up"). Both "refer to a state of confusion and have been in use for over 50 years in American English." *Id.* at 5. These words are learned in childhood and do not come as a shock to most children. *Id.* at 9-10.

The First Amendment protects these expletives in literature, art, and political speech in part because of their emotive power. *Cohen v. California*, 403 U.S. 15, 26 (1971); see also *Denver Area Ed. Telecommunications Consortium v. FCC*, 518 U.S.

[11] The WBEZ case is still under investigation. *Amici* will supply a copy of Professor Jay's Statement at the court's request.

727, 805 (1996) (opinion of Kennedy, J.) ("[i]n artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions.'") (quoting *Cohen* in part); *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Alito and Kennedy, JJ., concurring) (the First Amendment protects any speech "that can plausibly be interpreted as commenting on any political or social issue").

Underlying the fleeting expletives rule is the FCC's assumption that all uses of these versatile and common words, whether in art, literature, documentary, news, or ordinary conversation, are harmful to minors – or almost all uses: the commissioners reserve for themselves the power to create an exception. The agency's brief illustrates the irrationality of this approach when it assumes harm from a child's asking a parent the meaning of "fuck" or a variant, whether uttered by a celebrity at an awards show, an actor in a romantic comedy, or President Bush. Pet. Brief 10, 18. But children ask their parents the meaning of words all the time; generally, we consider that a good thing. It is the parent's job to teach the child that highly charged vulgar words are not appropriate in polite conversation – not the government's job to make sure children do not hear these words at all. There has never been any evidence that merely hearing a vulgar word is harmful to children. In today's world, children hear these words from many sources. The important point is that they learn when the words are appropriate and when they are not. As in *Reno*

v. ACLU, 521 U.S. at 878, at the very least, "the strength of the government's interest in protecting minors is not equally strong" throughout the broad reach of the FCC's indecency regime.

The FCC recites the mantra of "context" in an attempt to escape the irrationality of its flat presumption against two common words that it finds offensive, along with any of their variants. But as the foregoing examples demonstrate, the FCC's idea of "context" means essentially unbridled discretion. The agency's claim to know when an expletive should be allowed relies not on any evidence of when a child might be adversely affected, but on the personal tastes and cultural assumptions of the commissioners, as the record amply shows.

A final example appears in the FCC's brief to this Court. The agency argues that its contextual judgments about offensiveness are justified, for surely a curse word used by "a wire-tapped organized-crime figure on a news program is far removed from the use of the same word in a dialogue on an awards show." Pet. Brief, 18. But who makes this judgment, and by what right does a government agency decide that a news program can use the actual words of a criminal (or perhaps a celebrity?), but an awards program cannot? What if the criminal curses during a docudrama? Why is this different from a police officer cursing during a fictional program such as "NYPD Blue"? Why are musicians barred from using vulgar words in a documentary, but (perhaps) allowed to use them on a news show?

Imposing on broadcasters the burden of demonstrating artistic or editorial necessity – as the FCC did in the case of "The Blues" – compounds the injury. As the Court recognized in *Freedman v. Maryland*, 380 U.S. 51 (1965), the First Amendment has a procedural dimension, which prohibits laws or regulations that impose on speakers the burden of proving that their speech should not be censored. See also *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004) (*Ashcroft II*) ("[t]here is a potential for extraordinary harm and a serious chill upon protected speech" where prosecution is likely and "only an affirmative defense is available"). The FCC's notion that broadcasters should bear the burden of establishing artistic necessity turns the First Amendment upside down.

Justice Breyer has noted that sometimes it is wise to watch how a medium develops before imposing strict legal rules. *Denver Area Ed. Telecommunications Consortium*, 518 U.S. at 740–42. We now have thirty years' experience with FCC censorship of broadcasting. It is long enough to conclude that the indecency regime cannot be reconciled with the First Amendment, and accordingly, can no longer be thought authorized by 18 U.S.C. § 1464.

3. FCC enforcement, both before and after its new fleeting expletives rule, has chilled valuable expression

The Court has repeatedly warned that the overbreadth doctrine "prohibits the Government

from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 237 (2002) (*Ashcroft I*). This is precisely what has happened as a result of the FCC's vague and shifting indecency regime.

In response to the fleeting expletives rule, PBS bleeped soldiers' language, and with it the reality of war reporting, from the documentaries "A Soldier's Heart" and "Return of the Taliban," and from a Frontline episode, "The New Asylums."[12] Language in PBS's "The Enemy Within" was purged even though it documented the specific words used by an informant to threaten a suspect.[13] A TV station in Boston said it would "probably have to edit references to sexual activities in a coming *Masterpiece Theater* production, 'Casanova.'"[14] PBS similarly wondered whether to pixilate actress Helen Mirren's mouth as she uttered an inaudible "fuck"

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[12] Kara Canty, *FCC'S Punishing Fines Have Chilling Effect on Broadcasters*, BALTIMORE SUN, Oct. 13, 2006, www.freepress.net/news/18315 (visited 10/13/06); Rebecca Dana, *@$#&% Ken Burns!* NEW YORK OBSERVER, Oct. 2, 2006, www.observer.com/20061002/20061002_Rebecca_Dana_media_nytv.asp (visited 10/thirty/06); Louis Wiley, Jr., *Censorship at Work*, CURRENT.ORG, July 2006, www.current.org/fcc/fcc0613indecency.shtml (visited 10/30/06).

[13] Wiley, *supra* n.13.

[14] Elizabeth Jenson, *Soldier's Words May Test PBS Guidelines*, NEW YORK TIMES, July 22, 2006, at A13.

from the driver's seat in another *Masterpiece Theater* production.[15]

In 2002, a documentary produced by American Public Media ("APM"), which chronicled "the sounds and voices of the World Trade Center and its surrounding neighborhood," was broadcast uncut on dozens of public radio stations. The program included a poem with the word "bullshit." When the show was rebroadcast in September 2006, APM "felt that it had no choice but to alert its affiliates and to 'bleep' this word" from the poem. Comments of Minnesota Public Radio/American Public Media, FCC Remand Proceedings, DA 06-1739 (Sept. 21, 2006), Affidavit of Thomas Kigin, ¶10, J.A. 188-90.

Niagara Frontier Radio administers a radio reading service for the blind; by 2006, it had aired more than 150,000 hours of book readings to thousands of visually impaired listeners. It broadcast through a leased subcarrier of a local FM signal as well as a local ABC affiliate with a wider range. In 2005, the ABC station removed the program, citing a single complaint about the Tom Wolfe novel *I Am Charlotte Simmons*. When the program was reinstated two weeks later, the station would air it only after 10 p.m., thereby reducing both the hours that visually impaired listeners can enjoy the show and the size of the listening audience. *Id.*, Affidavit of Robert Sikorski, J.A. 239-45.

The widely syndicated program *Broadway's Biggest Hits*, with more than 150,000 listeners, faced

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[15] Dana, *supra* n. 13.

many dilemmas in the wake of the new indecency and profanity rules. In 2004, stations fearful of FCC punishment were given a sanitized version of a song in the hit musical *A Chorus Line*, which "humorously tells of how plastic surgery and improving one's 'tits and ass' can improve one's chances for a job." In the next two years, these concerns resulted in full review of the playlist and deletion of "well-known, popular, and culturally and musically significant songs" from such shows as *Les Miserables*, *The Producers*, *Avenue Q*, and *Miss Saigon*. *Id.*, Affidavit of Stanley Wilkinson, J.A. 213-21.

It will not avail the FCC to argue that in some or all of these instances, it might find that the vulgar words, "in context," were not indecent. Programmers – especially at noncommercial stations with limited budgets – cannot afford to risk an indecency fine,[16] or even pay the legal fees to respond to FCC investigations. Because the permissible parameters are so shifting and unclear, self-censorship of fiction, drama, history, and journalism has occurred with increasing frequency. PBS President Paula Kerger explained: "When you have stations whose operating budgets in some cases are only a couple of million dollars, even frankly the old fines, once you factor in all the legal work and so forth, were daunting. The fines now would put stations out of business."[17] The

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[16] In 2006, Congress increased the fines for broadcast indecency tenfold, to $325,000 for each violation. Broadcast Indecency Enforcement Act, Pub.L. 109-235, 120 Stat. 491 (2006).

[17] Quoted in Matea Gold, *PBS "War" Battle Plans*, LOS ANGELES TIMES, July 27, 2006, www.freepress.net/news/16755 (visited 11/6/06). See also Kigin Affidavit, ¶5, J.A. 183 ("MPR simply

FCC's presumptive ban on fleeting expletives, with exceptions to be invoked at the agency's discretion, has created a severe chill, especially in noncommercial broadcasting.

B. The Post 10-p.m. Safe Harbor Does Not Save the FCC's Censorship Regime

The plurality in *Pacifica* pointed to the post-10 p.m. safe harbor as saving the indecency regime from constitutional infirmity. There are several reasons why today the safe harbor does not adequately protect the First Amendment rights of broadcasters, producers, directors, writers, and performers.

First, the audiences are smaller late at night. TV viewing falls significantly after 10 p.m.; radio listening begins to shrink after 6 p.m. and drops to negligible levels by 10.[18] Second, the safe harbor realistically offers only two hours for potentially risky programming, since most people are sleeping and not watching TV or listening to the radio from midnight to 6 a.m. It was not without reason that the

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cannot risk either huge fines or license revocation .... if it were to guess wrong about what is now acceptable for broadcast").

[18] The Nielsen website lists the ten most-watched broadcast TV shows every week. For the week of October 30, 2006, only one of the ten most-watched shows aired at or after 10 p.m. *See* Nielsen Media Research, *Top TV Ratings* (Nov. 10, 2006), www.nielsenmedia.com (visited 11/10/06). For radio, listening peaks around 7 a.m., "remains strong" through 6 p.m., and tapers off after that, with just a tiny fraction of the daytime audience by 10 p.m. ARBITRON, RADIO TODAY (2005 ed.), at 6, www.arbitron.com/downloads/radiotoday05.pdf (visited 11/17/06).

D.C. Circuit referred to the safe harbor as "broadcasting Siberia." *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996).

Consigning possibly indecent programs to the post-10 p.m. safe harbor is rarely an adequate substitute for earlier time slots. Southern California Public Radio ("SCPR"), for example, for years broadcast performances at LA Theater Works, typically on Saturday nights at 8 pm – "consistent with when the curtain typically rises on live performances." Kigin Affidavit, ¶8, J.A. 186. In 2004, SCPR aired Theater Works' production of "Dinah Was," a Tony Award-winning play about singer Dinah Washington. "Not surprisingly," APM official Thomas Kigin says, "given Ms. Washington's life and times, the play contains various commonplace 'swear' words and sexual expressions." Heightened FCC censorship and the threat of large fines, however, made SCPR nervous. First, it stopped the broadcasts entirely; then, having concluded "that it is neither appropriate nor feasible to edit the performances for language," SCPR moved the broadcasts to 10 p.m. But their future was uncertain, for SCPR and Theater Works agree "that broadcasts at this late hour will attract only a fraction of the former audience for this series of outstanding theatrical events." *Id.*, J.A. 186-87.

The "safe harbor" is even less of an adequate alternative for live programming. A letter submission in the FCC's remand proceeding explained: "Live broadcast television is a direct link to the real world around us, and while sometimes unpredictable, is nonetheless one of the things that

continues to bring Americans together to share historic moments." Center for Creative Voices in Media *et al.*, Letter to William Davenport, No. DA 06-1739 (Sept. 21, 2006). Spontaneous news coverage largely happens before 10 p.m.; delay defeats its purpose by denying the public the immediacy of live programming.

A safe harbor might have made sense under the facts of *Pacifica*, where one "specific broadcast ... represented a rather dramatic departure from traditional program content," *Reno*, 521 U.S. at 867. But given the FCC's expanded and highly subjective censorship rules, and the pervasiveness of frank language in today's art, literature, news, and documentary programming, there is simply not enough time after 10 p.m. and before midnight to accommodate all the of the constitutionally protected material that is endangered. This problem is exacerbated by the unpredictability and overbreadth of the indecency standard. Broadcasters, especially small or noncommercial broadcasters that cannot afford hundreds of thousands of dollars for a single indecency violation, will end up purging anything that might conceivably be offensive to a majority of FCC commissioners from most of their shows in order to air them before 10 p.m.[19]

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[19] Although time-shifting technologies such as TiVo make it possible to record late night programming for viewing at more convenient times, it is questionable how many people take advantage of this option. Certainly, this technological advance has not led broadcasters to begin to air popular but potentially risky programs late at night; instead, they have self-censored in response to the fleeting expletives rule.

As the Court recognized in *Reno*, programming that the FCC might consider indecent would have value for many minors. 521 U.S. at 877-78. Books by John Steinbeck and Toni Morrison, documentaries such as "The Blues," and news coverage that, the agency has warned in its Remand Order, might be found indecent are examples of valuable material that should not be consigned to the few available late-night hours.

In *U.S. v. Playboy Entertainment Group*, 529 U.S. 803 (2000), the Court struck down a safe harbor requirement for sexually explicit material – a narrower category of speech than the potentially indecent speech at issue in this case. *Playboy* involved cable TV, which enters the home exactly as broadcast television does for most Americans today. Indeed, the programming at issue in *Playboy* came into the home uninvited, largely in the form of "signal bleed." The Court found, however, that time channeling "silences ... protected speech for two-thirds of the day." *Id* at 812. "It is of no moment," the Court explained, "that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. *Ibid.*

Thus, whatever the acceptability of time-channeling in the era of *Pacifica*, it is not adequate today to secure First Amendment rights. Given the breadth and uncertainty of the FCC's indecency regime, and the disadvantages of late-night programming, broadcasters are forced to "steer far wider of the unlawful zone" in order to air material before 10 p.m.

III. SECTION 1464 SHOULD BE CONSTRUED TO BAN ONLY CONSTITUTIONALLY UNPROTECTED OBSCENITY

The foregoing sections not only show why 18 U.S.C. § 1464 cannot be construed to permit the fleeting expletives rule; they also show that the entire indecency regime, in light of thirty years' experience, can no longer be justified by any constitutionally permissible construction of the statute. Indeed, the Court has already held that the FCC's indecency standard is unconstitutionally overbroad, and has essentially held that it is unconstitutionally vague as well. Although it is not necessary to resolve this case, the Court should take the opportunity to clarify that, given the dramatic changes in media technology since 1978, government censorship of constitutionally protected speech on the airwaves can longer be supported by section 1464.

A. Case Law Since *Pacifica* Has Recognized the Vagueness and Overbreadth of the FCC's Indecency Test

Pacifica was an "emphatically narrow" decision, *Sable Communications*, 492 U.S. at 127. Nevertheless, Congress chose the FCC's indecency standard to regulate the Internet when it passed the 1996 Communications Decency Act (the "CDA"). Invalidating the CDA in *Reno v. ACLU*, the Court condemned the indecency test as both vague and overbroad.

The Court found the test "problematic" because such terms as "patently offensive" and

"community standards" are left undefined. The lack of definition creates "special First Amendment concerns because of its obvious chilling effect on free speech." *Reno*, 521 U.S. at 870-72. The Court explained the difference between "patently offensive" in the CDA, where it was troublesomely vague, and in obscenity law, where it is only one part of the definition of prohibited speech. The other, more specific requirements of the obscenity definition – that the expression appeal to "the prurient interest," lack serious value, and be "specifically defined by the applicable state law" – cabin the inherent vagueness of "patent offensiveness." *Id.* at 872-74. Without these additional safeguards, the CDA's ban on "patently offensive" speech "unquestionably silences some speakers whose messages would be entitled to constitutional protection." *Id.*. at 874. Although the conclusion on vagueness fell just short of a square holding, the Court has recently cited *Reno* for the proposition that the indecency standard is unconstitutionally vague because it requires "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008) (citing *Reno*, 521 U.S. at 870-71 & n. 35); see also *Ashcroft II*, 535 U.S. at 578 (describing the indecency standard's "unprecedented breadth and vagueness").

Reno struck down the indecency standard on grounds of overbreadth. The Court reiterated that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," 521 U.S. at 874; see also *Sable*, 492 U.S. at 126, and

noted that indecency "cover[s] large amounts of nonpornographic material with serious educational or other value." 521 U.S. at 877-78. Following the time-honored rule that government cannot reduce the adult population to reading or viewing "only what is fit for children," *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957), the Court noted that there are less constitutionally burdensome ways to shield youngsters from material that may not be appropriate for them. 521 U.S. at 874-79.

Although *Reno* distinguished *Pacifica*, the Court's condemnation of the indecency standard on grounds of both vagueness and overbreadth cannot be reconciled with the FCC's broad-ranging and whimsically discretionary application of that standard to broadcasters over the past thirty years. The Commission's use of the same indecency test that the Court condemned in *Reno*, *Ashcroft II*, and *Williams* cannot be squared with a constitutional reading of section 1464.

B. Broadcasting Is No Longer "Uniquely Pervasive" and "Uniquely Accessible to Children – The Characteristics That in *Pacifica* Were Said to Justify FCC Censorship of Constitutionally Protected Expression

At the time of *Pacifica*, broadcasting was the only electronic mass medium; now, it is one of many, and indistinguishable to most viewers from cable television. Thus, the "uniquely pervasive" presence of broadcasting that this Court identified in *Pacifica* as the main rationale for subjecting this particular

medium to FCC censorship of nonobscene speech no longer exists. As the court of appeals recognized, "it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children." Pet. App. 40a .

To be sure, broadcasting remains pervasive, but no longer uniquely so, given that about 90% of the nation's households receive *all* their TV programming through one, nonbroadcast distributor (usually either cable or satellite).[20] This convergence of technology eliminates the justification for a government censorship system that is constitutionally off-limits for every other medium. *E.g.*, *Reno*, 521 U.S. 844 (the Internet); *Denver Area Ed. Telecommunications Consortium*, 518 U.S. 727 (public and leased access cable).

Underlying *Pacifica* was a history of lesser First Amendment protection for broadcasting. Government regulation was justified because of the limited capacity of the broadcast spectrum, and consequent scarcity of licenses. Whatever one thinks of the scarcity rationale in the modern media world, there is surely a difference between structural

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[20] *Satellite TV Penetration Up Significantly*, CONSUMERAFFAIRS.COM, Aug. 18, 2005, www.consumeraffairs.com/news04/2005/jdpower_satellite.html (visited 11/6/06); see also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2506-07 (2006) (94.2 million out of a total of 109.6 million TV households receive all their video programming through an "MVPD" [multichannel video programming distributor] – either cable, satellite, or other nonbroadcast technology).

rules designed to promote more speech, see *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943) (approving FCC rules that curbed national networks' market power by prohibiting them from dictating the programming of affiliated stations),and censorship rules based on broad, shifting, and culturally driven criteria such as "patent offensiveness."

Moreover, as the court of appeals noted, technological developments since *Pacifica* make government control unnecessary in those instances where parents wish to shield their children from programming they consider inappropriate. Pet. App. 41a. The FCC itself has recognized that v-chips and lockboxes are readily available blocking technologies. *Saving Private Ryan*, 20 FCC Rcd at 4508, nn. 8-9. Similarly, this Court, held that lockboxes and other technologies were less constitutionally burdensome ways of addressing parental concerns in striking down a time-channeling requirement for indecency on cable. *Playboy*, 529 U.S. at 809-15. The same reasoning applies here. Just as the courts have long recognized that section 1464 cannot be read literally to impose a total ban on nonobscene broadcast speech, but must include a safe harbor,[21] so section 1464 can no longer be read to permit a federal agency's unbridled discretion to censor nonobscene speech that it considers "patently offensive."

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[21] See *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509-10 (.D.C. Cir. 1991) (*"ACT II"*); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 (D.C. Cir. 1988) (*"ACT I"*).

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization that has defended free speech principles since its founding in 1920. Of particular relevance here, the ALU has participated in many of the leading cases challenging the government's efforts to restrict speech on the basis of "indecency," including *FCC v. Pacifica*, 438 U.S 726 (1978), and *Reno v. ACLU*, 521 U.S. 844 (1997). **The New York Civil Liberties Union** (NYCLU) is a statewide affiliate of the national ACLU.

American Booksellers Foundation for Free Expression (ABFFE) is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech.

American Federation of Television and Radio Artists (AFTRA) is a national labor organization with a membership of over 70,000 professionals working in the news, entertainment, advertising and sound recordings industries. AFTRA's membership includes actors, news reporters, anchors, sportscasters, talk show hosts, announcers, disc jockeys, producers, writers and other on-air and off-air broadcast employees; royalty artists and background singers whose sound recordings are played on radio stations; and other performers on radio and broadcast TV.

Directors Guild of America (DGA) represents approximately 13,400 directors and

members of the directorial team working in U.S. cities and abroad. Their creative work is represented in feature film, television, commercials, documentaries, and news. The DGA's mission is to protect the economic and creative rights of directors and the directorial team.

First Amendment Project (FAP) is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. Among FAP's clients are several independent, nonprofit broadcast content-providers that are threatened by the ambiguities and inconsistencies in the FCC's policies and whose ability to report on issues of local and national significance is thus compromised.

Minnesota Public Radio (MPR) is a regional public radio network that serves some 650,000 listeners each week across seven states on 37 public radio stations. In addition, as **American Public Media** (APM), it produces more nationally distributed news and documentary programming than any other station-based public radio organization, reaching some 15.5 million people around the world per week.

National Alliance for Media Arts & Culture (NAMAC) is the national service organization for the media arts, providing leadership training and professional development, organizational capacity building support, and original research about the field. With more than 300 member organizations serving an estimated 400,000 film, video, audio, and digital creators, NAMAC has a strong interest in ensuring that language or gestures central to the meaning of film and audio

works remain intact and are not eliminated or altered when presented to the public.

National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 50 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensible to a healthy democracy. The positions advocated by the NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

National Federation of Community Broadcasters (NFCB) represents over 200 community-oriented radio stations across the United States. Community radio is committed to airing diverse, authentic voices and finds the current FCC indecency regulations inconsistent and overbroad. Since most community radio stations operate on small budgets, they can not afford the fines that can now be charged for an inadvertent broadcast of something that the Commission might decide is indecent or profane, which has a chilling effect on their editorial freedom and ability to serve their communities.

PEN American Center (PEN) is an organization of over 2,900 novelists, poets, essayists, translators, playwrights, and editors. As part of International PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has taken a leading role in attacking rules that limit freedom of expression in this country.

Washington Area Lawyers for the Arts is the largest provider of pro bono legal services and legal education on arts-related matters in the Washington, D.C., metropolitan area, annually serving hundreds of artists and artistic organizations. Through the work of attorney volunteers who regularly counsel low-income artists, the organization has observed directly the chilling effects on artists' free expression rights caused by vague and overreaching government censorship.

AMICUS CURIAE BRIEF

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No. 07-582

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Supreme Court of the United States

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UNITED STATES OF AMERICA,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF CALIFORNIA BROADCASTERS ASSOCIATION, GEORGIA BROADCASTERS ASSOCIATION, IOWA BROADCASTERS ASSOCIATION, KANSAS BROADCASTERS ASSOCIATION, MAINE BROADCASTERS ASSOCIATION, MINNESOTA BROADCASTERS ASSOCIATION, MISSOURI BROADCASTERS ASSOCIATION, MONTANA BROADCASTERS ASSOCIATION, NEBRASKA BROADCASTERS ASSOCIATION, NEW JERSEY BROADCASTERS ASSOCIATION, AND OKLAHOMA BROADCASTERS ASSOCIATIONAS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are the California Broadcasters Association, Georgia Broadcasters Association, Iowa Broadcasters Association, Kansas Broadcasters Association, Maine Broadcasters Association, Minnesota Broadcasters Association, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, New Jersey Broadcasters Association, and Oklahoma Broadcasters Association (collectively, the "Named State Associations"). Each of the Named State Associations is, in turn, a voluntary association of broadcasters who are Federal Communications Commission ("FCC") licensees of radio and television stations licensed to communities within their respective states.

Each of the Named State Associations has the responsibility to represent its members in matters relating to the broadcasting industry and government regulation. And each has a keen interest in ensuring that the FCC's indecency policy does not impose upon its members the threat of crippling liability and consequent self-censorship.

SUMMARY OF ARGUMENT

On pain of fines of $325,000 per incident, radio and television stations across the Nation are now forced by the FCC's fleeting expletives policy to engage in expensive monitoring and policing of live broadcasts lest a stray Anglo-Saxon word slip out, no matter how isolated and no matter

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. In accordance with Rule 37.6, *Amici* state that this brief was not written in whole or in part by counsel for any party, and no persons other than *Amici* have made a monetary contribution to the preparation or submission of this brief.

how lacking in sexual or excretory meaning in context. For many broadcasters, the chilling effect is profound and discourages live programming altogether, with attendant loss to valuable and vibrant programming that has long been part of American culture.

Nothing in *FCC v. Pacifica* authorizes or requires this result. *Pacifica* allowed the FCC to sanction indecent language only where it was so repetitive and sexual and excretory in meaning as to amount to "verbal shock treatment." *Pacifica* expressly declined to assess the First Amendment treatment appropriate to a mere "occasional expletive."

Moreover, nothing in *Pacifica* authorized the FCC to engage in vague, selective or arbitrary regulation of indecent language. Yet the current policy allows unpredictable exceptions for "artistic" and "news" purposes that force broadcasters to guess at what programming is and is not actionable, and therefore necessarily to steer far wide of the forbidden zone.

The inexorable result is widespread broadcaster self-censorship that deprives the public of valuable and traditionally accessible live news, sports, talk and entertainment programming. Such precautionary measures as tape delays are expensive, cumbersome, and hardly foolproof, as the facts underlying this case illustrate. And the cost and risk associated with such measures can be prohibitive, depending on station and market size.

The pall thus cast on live broadcasting is needless, for filtering technologies have increasingly enabled parental self-help with respect to television as well as cable and the Internet. Such alternatives are far preferable to the FCC's restrictive policies, and reinforce the conclusion that there is no need to expand the First Amendment limits set forth in *Pacifica.*

For all these reasons, the FCC's indecency policy, at a minimum, raises serious First Amendment concerns. Under the canon of constitutional avoidance, FCC authority to impose the new policy should be read narrowly and the decision below should be affirmed.

ARGUMENT

In 2004, the FCC reversed a longstanding policy that fleeting expletives would not be actionably indecent under the Commission's indecency standard. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 19 F.C.C.R. 4975, 4980 ¶ 12 (2004) ("*Golden Globes*"). While this appeal arises under the Administrative Procedure Act, the FCC's reversal of its longstanding policy against sanctioning "fleeting expletives" also raises serious First Amendment questions.

This Court has recognized repeatedly that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Only the "affirmative intention of the Congress clearly expressed" can justify any broader construction. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (construing NLRA as denying jurisdiction to NLRB to adjudicate a labor dispute at church-operated schools in order to avoid serious First Amendment questions).

To avoid serious constitutional questions here about the validity of the FCC's indecency regime, this Court should construe Congress's grant of power to the FCC to regulate indecent speech as precluding its ability to sanction fleeting expletives absent clear statement from Congress. No such statement exists. To the contrary, Congress's grant of power to the FCC under 18 U.S.C. § 1464 to sanction indecent lan-

guage is governed by the overarching requirement in the Communications Act that the FCC avoid interfering with licensees' editorial decisions. 47 U.S.C. § 326 ("Nothing in [the Act] shall be understood or construed to give the Commission the power of censorship . . . , and no regulation or condition shall be promulgated or fixed . . . , which shall interfere with the right of free speech . . . ."). The Court thus should not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *DeBartolo*, 485 U.S. at 575. And were this Court to reach the constitutional question directly, it should find that the First Amendment protects the speech at issue here.

I. SANCTIONING FLEETING EXPLETIVES EXCEEDS THE FIRST AMENDMENT LIMITS SET FORTH IN *PACIFICA* FOR THE REGULATION OF BROADCAST INDECENCY

This Court set forth the governing framework for First Amendment limits on the regulation of broadcast indecency in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which held that the First Amendment permits the FCC to regulate expletives aired on broadcast media when tantamount to "verbal shock treatment." *Id.* at 757 (Powell, J., concurring). *Pacifica* involved a mid-afternoon radio broadcast of comedian George Carlin's twelve-minute "Filthy Words" monologue – a satirical rant deliberately filled with repeated sexual and excretory expletives. *Id.* at 729 and 751-55 (appendix containing verbatim transcript). Noting that broadcast media were "uniquely pervasive" and "uniquely accessible to children," *id.* at 748, 749 (majority opinion), the Court observed that less restrictive alternatives like the warning that preceded Carlin's monologue could not "completely protect the listener or viewer from unexpected program content." *Id.* at 748. Based on these features, the Court held that the FCC

did not violate a radio station's free speech rights in sanctioning the airing of Carlin's monologue. *See id.* at 749-50.

Taking care to "emphasize the narrowness of [its] holding," however, and reiterating that "context is all-important," *Pacifica* did not address whether the FCC could sanction an "occasional expletive." *Id.* at 750 (majority opinion); *id.* at 760-61 (Powell, J., concurring) (noting that the Court's holding did not "speak to cases involving the isolated use of a potentially offensive word"). It suggested that, absent a calculated design to shock, its narrow holding might not apply. For example, it exempted sexual or excretory expletives in "an Elizabethan comedy." *Id.* at 750 (majority opinion).

The narrowness of *Pacifica*'s holding is unsurprising given that the First Amendment protects the public use of expletives or sexually suggestive speech in other contexts. *See Cohen v. California*, 403 U.S. 15, 26 (1971); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-27 (2000). And the FCC long recognized the narrowness of *Pacifica*'s holding, limiting enforcement for over twenty-five years to "only repetitive use of the specific words [in the Carlin monologue]." *New Indecency Enforcement Standards, Public Notice*, 2 F.C.C.R. 2726, 2726 (1987). The FCC disavowed any notion that *Pacifica* covered fleeting expletives: "If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (1987).

Only in 2004 did the FCC depart from its settled understanding of *Pacifica* by announcing a shift to censoring fleeting expletives. But, for the following reasons, the concerns expressed in *Pacifica* do not apply in this context.

A. Unscripted Fleeting Expletives Are Not Deliberate And Repetitive

In *Pacifica*, this Court allowed the FCC to sanction a radio broadcast of a recorded monologue that bombarded listeners with sexual or excretory expletives only on the basis that it amounted to "verbal shock treatment." *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). Instead of the "occasional expletive" at issue here, *id.* at 750, the Court focused on expletives "repeat[ed] . . . over and over again." *Id.* at 729 (majority opinion). The Carlin monologue lasted twelve minutes and used the word "fuck" or one of its variants 32 times and the word "shit" or one of its variants 70 times, in addition to countless other expletives. *See Pacifica*, 438 U.S. at 751-55 (appendix).

Unscripted fleeting expletives, in contrast, are neither deliberate nor repetitive. Regulating them thus necessarily would impose far greater burdens on broadcasters in practice. A radio or television station can guard against a preplanned string of expletives, or channel it to a time zone when children will not be exposed. *See id.* at 750 (emphasizing the FCC's "nuisance rationale" for channeling indecent speech to different hours); *id.* at 757 (Powell, J. concurring) (stating that the FCC's channeling rationale provided strong support for its decision). No such precautions are readily available, by contrast, for spontaneous indecent language. By nature, an unscripted expletive cannot be time-channeled, because the station has no forewarning. Nor are simple precautions adequate. Even a five-second tape delay was not enough, for example, to enable Fox to bleep out Cher's expletive or one of Nicole Richie's expletives during the Billboard Music Awards. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299, 13311 ¶ 32, 13312-13 ¶ 34 (2006) (*"Remand Order"*).

Thus, while *Pacifica* upheld the time-channeling of relentlessly repeated indecent words in a pre-recorded broadcast, fining broadcasters for inadvertent or spontaneous expletives uttered in live broadcasts is likely to deter the broadcast of live events in the first place. Nothing in *Pacifica* suggested that sanctions were permissible where channeling was impossible.

B. Fleeting Expletives Are Not Necessarily Sexual Or Excretory

Unlike Carlin's monologue, the fleeting expletives in this case do not describe sexual or excretory activities and organs. Cher and Nicole Richie, for example, spontaneously uttered words on live television "for emphasis or as an intensifier." *Id.* at 13304 ¶ 16. Including a fleeting expletive on live television may simply capture the emotion of a live event or speaker. *See Cohen v. California*, 403 U.S. at 26 (noting, in protecting a jacket saying "Fuck the Draft," that the "emotive function" of speech may be more important than the cognitive). The FCC itself implicitly recognized as much when it decided that a "Survivor: Vanuatu" contestant's use of the word "bullshitter" was non-actionable because the contestant stated the word during a live television interview. *Remand Order*, 21 F.C.C.R. at 13328 ¶ 73. Imperiling all expletives on live television, regardless of their sexual or excretory connotations, goes beyond *Pacifica*.

II. THE FCC'S VAGUE AND STANDARDLESS INDECENCY REGIME CAUSES NEEDLESS SELF-CENSORSHIP BY BROADCASTERS

The FCC's current indecency regime presumes that all variants of the words "fuck" and "shit" are indecent, but grants exceptions—for example, where use of expletives is "integral" to a work or part of a "*bona fide* news interview." Such *ad hoc* and subjective determination by government of the relative value of different types of speech raises serious

First Amendment questions not reached or addressed in *Pacifica*. Such selective enforcement renders the policy too vague for broadcasters to have fair notice of what speech is and is not permitted. And such exercise of standardless discretion risks impermissible viewpoint discrimination.

A. The FCC Indecency Policy Is Impermissibly Vague

The First Amendment "demands a greater degree of specificity than in other contexts," lest speech be deterred by the speaker's uncertainty about what is permitted and reluctance to come too close to the line. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). Although the FCC's presumption that the words "fuck" and "shit" are indecent in all their variants does provide some guidance, not even the FCC claims that they may be sanctioned in every circumstance. Broadcasters should not be forced to guess as to when use of such words will be actionable and when it will not. Nor should their speech be chilled in an attempt to comply with this scheme.

The FCC holds that indecent broadcasts are actionable where the material falls within the "subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities," and the broadcast must be "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C.R. 7999, 8002 ¶¶ 7-8 (2001) (emphasis in original). The FCC has clarified "patently offensive" as depending upon: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value." *Id.* at 8003 ¶ 10 (emphasis omitted).

These factors, however, provide little objective guidance for broadcasters. All three depend upon the subjective reactions, opinions, and beliefs of Commissioners or their staff watching or listening to a past broadcast with ample time to reflect, unlike broadcasters who must make split-second judgments in real time. The second factor, involving repetition, is hardly dispositive or these cases about fleeting expletives never would have arisen. And unchanged since 2001, several years before the FCC's abrupt change in policy, these factors in fact give local broadcasters, commercial or noncommercial, virtually no true guidance on what constitutes indecent programming.

Faced with such opaque definitions, broadcasters must assume that all expletives are actionable or else risk the possibility of huge sanctions, requiring them to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1974) (internal citations and quotations omitted). As this Court has stated, "Free speech may not be so inhibited." *Id.*

The FCC's policy has resulted in just such inhibition. For instance, 66 ABC affiliates in cities both large and small felt so threatened by the possibility of FCC sanctions that they refrained from airing the film *Saving Private Ryan* on Veteran's Day in 2004. *See* Frank Rich, *Bono's New Casualty: 'Private Ryan'*, N.Y. Times, Nov. 21, 2004, at AR1. Similarly, on September 11, 2006—the fifth anniversary of the World Trade Center attacks—CBS stations covering approximately 10% of the nation refused to air the Peabody Award-winning documentary *9/11* during prime time out of fear of FCC sanctions. *See* Lisa de Moraes, *Sunday Night Football Bulls Past 9/11 Programs*, Wash. Post, Sept. 12, 2006, at C7.

Such inhibition and self-censorship is not confined to network programming; it affects small broadcasters too, often

in more crippling ways. For example, until February 11, 2005, the Niagara Frontier Radio Reading Service ("NFRRS") broadcast readings from newspapers, books, magazines, and other printed material to blind and visually impaired persons twenty-four hours a day on the Secondary Audio Channel of local ABC-TV affiliate WKBW-TV/Channel 7 in Buffalo, New York. But when an expletive in a reading of Tom Wolfe's best-selling novel *I Am Charlotte Simmons* caught a listener's attention and prompted a complaint, the station, fearing "potential heavy fines," announced that NFRRS's fourteen years of broadcasts on the station were "done." After two weeks, the station came around, but allowed NFRRS to resume broadcasting only during drastically reduced hours, thereby providing the station's visually impaired audience with far less service than during its once "24-7" readings. *See* Anthony Violanti, *One Complaint Limits Reading Service for the Blind*, Buffalo News, Mar. 2, 2005, at C1.[2]

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[2] Comments presented to the FCC demonstrate that there were numerous other examples of self-censorship as a result of the FCC's vague standard, even by non-commercial broadcasters. *See, e.g.*, Comments of Minnesota Public Radio, DA 06-1739 (Sept. 21, 2006), *available at* http://www.fcc.gov/DA06-1739/mpr.pdf, Declaration of Thomas J. Kilgin, at 9-10 (Southern California Public Radio declined to broadcast an interview with a student whose friends were injured in a shooting rampage at his school because the student used expletives); Declaration of Stanley ("Bud") Wilkinson, Jr. at 5 (the syndicated radio program Broadway's Biggest Hits has deleted or censored songs such as "Master of the House" from "Les Miserables," "The King of Broadway" from "The Producers," and "American Dream" from "Miss Saigon"); Declaration of Thomas J. Kilgin, at 5-6 (after broadcasting a highly regarded Los Angeles theater's production of a Tony Award-winning play that contained expletives, Southern California Public Radio cancelled its broadcast of live performances from the theater and later relegated such broadcasts to 10 p.m. on Saturdays, attracting a much smaller audience); Declaration of Dennis Fisher, at 2-3 (WNEP-TV16, a Pennsylvania television station, no longer provides any live coverage of events where crowds are present, except in the event of a "civil emergenc[y]").

B. By Granting Arbitrary Exceptions To Its Indecency Policy, The FCC Exercises Impermissibly Standardless Discretion.

As might be expected of such a vague regulation, the FCC's indecency policy has allowed for "'arbitrary and discriminatory enforcement.'" *Smith v. Goguen*, 415 U.S. at 573 (internal citations omitted). The FCC's policy presumes that, because "[t]he 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language," any use of that word has sexual connotations and thus falls within the scope of the indecency definition, *Golden Globes*, 19 F.C.C.R. 4975, 4979 ¶ 8, and is patently offensive under contemporary community standards. *Id.* at ¶ 9. In 2006, in the FCC decisions at issue in this case, the Commission reaffirmed its *Golden Globes* decision regarding the presumptive indecency of the "F-Word." *Remand Order*, 21 F.C.C.R at 13304-05 ¶¶ 16-17. Furthermore, the Commission held that entertainer Nicole Richie's use of the S-Word at a broadcast of the 2003 Billboard Music Awards was actionably indecent under the Commission's regime. *Id.* at ¶ 16.

In at least two instances, however, the Commission has granted exceptions to these presumptive prohibitions. In 2005, the Commission held that repeated and deliberate use of numerous expletives was not indecent in ABC's broadcast of the film "Saving Private Ryan." *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, 4512-13 ¶ 14 (2005). In that decision, the Commission found that deleting the pervasive expletives "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Id.* at 4513 ¶ 14.

Similarly, in the *Remand Order* at issue in this case, the Commission found that an interview on CBS's "The Early Show" with a "Survivor: Vanuatu" contestant, in which the interviewee referred to a fellow contestant as a "bullshitter," *Remand Order*, 21 F.C.C.R. at 13326 ¶ 67, was not actionably indecent since the word was used in the context of a "*bona fide* news interview." *Id.* at 13328 ¶ 72-73. The Commission stated that, although "there is no outright news exemption from our indecency rules," it was imperative that it "proceed with the utmost restraint when it comes to news programming" and found it "appropriate . . . to defer to CBS's plausible characterization of its own programming" as a news interview. *Id.* at 13327-28 ¶ 71-72.

By contrast, the FCC declined to extend its artistic exception to "Godfathers and Sons," a Martin Scorsese documentary on the history of the blues in which several jazz musicians who were interviewed used expletives. *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2686 ¶ 82 (2006) ("*Omnibus Order*"). In issuing a $15,000 Notice of Apparent Liability ("NAL") against a public television station for airing the documentary, the FCC stated, "While we recognize here that the documentary had an educational purpose, we believe that purpose could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." *Id.*

Similarly, the FCC issued a $3.35 million NAL for broadcast of an episode of *Without a Trace* where the FCC determined that non-explicit dramatization highlighting the problems facing unsupervised teenagers, including sexual activities, "goes well beyond what the story line could reasonably be said to require." *In re Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace,"* 21 F.C.C.R. 2732, 2736 ¶ 15 (2006).

The FCC also issued a $27,500 NAL for broadcast of the film, *The Pursuit of D.B. Cooper*. It stated that it "[did] not believe that [the language used] was essential to the nature of an artistic or educational work or that editing the language would have materially altered the nature of the program." *Omnibus Order*, 21 F.C.C.R. at 2689 ¶ 99.

Thus, since its *Golden Globes* Order, the FCC has enforced its indecency regime in an arbitrary and discriminatory manner, allowing exceptions to the regime when it deems certain programming to merit use of expletives for the sake of artistic integrity or a "*bona fide* news interview," and enforcing it against other programming using identical language. Such inconsistent results subject different speech to different burdens depending on its content, a cardinal violation of the First Amendment in other contexts.

Government has no business drawing distinctions among uses of identical language based upon a subjective view of which such uses are more artistic, topical or edifying than others. It "may not select which issues are worth discussing or debating," *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Even *Pacifica* disavowed any government license to determine "which speech protected by the First Amendment is most valuable and hence deserving of the most protection, and which speech is less valuable and hence deserving of less protection." *Pacifica*, 438 U.S. at 761 (Powell, J., concurring) (internal quotations omitted).

In contravention of these principles, the FCC's approach amounts to a standardless licensing scheme for fleeting expletives. This Court has consistently held unconstitutional any licensing scheme that places unfettered discretion in the hands of the licensor. *See, e.g., Lovell v. Griffin*, 303 U.S. 444 (1938); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (plurality opinion); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Hague v. CIO*, 307 U.S. 496 (1939). Standardless licensing schemes present "two major First

Amendment risks . . . : self censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting reviewing, and correcting content-based censorship." *Lakewood*, 486 U.S. at 759 (plurality opinion). Both concerns are amply borne out here.

For these reasons, the FCC's indecency policy, as enforced in any context other than broadcasting, would readily be held vague and standardless in violation of the First Amendment. Even in the broadcasting context, this policy gives rise to serious First Amendment concerns warranting limiting statutory and regulatory construction.

III. HEAVY FINES IMPOSED BY THE FCC FOR THE USE OF FLEETING EXPLETIVES DISCOURAGE LIVE BROADCASTING

For the reasons noted above in Parts I and II, the FCC's fleeting expletives policy goes much further than *Pacfica* authorized by sanctioning unscripted and non-repetitive expletives, and is vague and rife with standardless exceptions that encourage broadcaster self-censorship, depriving the public of valuable programming. For both reasons, it discourages live radio and television broadcasts that have long been an integral part of the Nation's culture and dialogue. These chilling effects are exacerbated by the broad discretion the FCC enjoys to impose crippling fines.

The live programming threatened by the FCC's indecency policy is significant. As of 2008, more than 112 million, or around 98%, of U.S. households had a television set, and over 70% watch television on any given evening.[3] Sports and news events that are carried live give viewers a real-time connection to events as they unfold. On February

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[3] *See* Nielsen Media Research, Universe Estimates, Jan. 1, 2008 *available at* http://www.nielsenmedia.com/nc/nmr_static/docs/2008_FINAL_National_UEs_Mkt_Brks%20_Pers.xls; Bill Fine, Op-Ed., *Tuning in to a TV revolution*, Boston Globe, Feb. 12, 2008, at A14.

3, 2008, 97.5 million Americans watched Super Bowl XLII, the second highest broadcast audience in U.S. history. *See* Lisa de Moraes, *Super Bowl's Biggest Score: 97.5 Million Viewers*, Wash. Post, Feb. 5, 2008, at C1. Live television broadcasts also provide vital reporting of breaking news events, from the September 11, 2001 terrorist attacks to the devastation of Hurricane Katrina in August 2005.

A. The FCC's Broad Discretion To Impose Crippling Indecency Fines Has Caused Self-Censorship By Live Broadcasters

The FCC has the ability to impose a number of sanctions for failure to comply with its decency regulations. *See* 18 U.S.C. § 1464 (2008) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). These sanctions can include heavy fines or even revocation of a broadcast station's license.[4] When a live broadcast is carried on many broadcast affiliates, a single fleeting expletive may be considered a separate violation by each affiliate, resulting in multiplication of the fines imposed on the broadcaster. If affiliates are not indemnified by broadcast networks, even a single violation may prove devastating.[5]

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[4] Congress recently enacted a tenfold increase in the maximum fine for indecent broadcasting. *See* 47 U.S.C.A. § 503(b)(2)(C)(ii) (2007) (raising the fine for broadcasting "obscene, indecent, or profane language" from $32,500 to up to "$325,000 for each violation or each day of a continuing violation"). *See also* 47 U.S.C. § 312(a)(6) (2007) ("The Commission may revoke any station license or construction permit for violation of section . . . 1464 of Title 18.").

[5] In addition to the threat of sanctions, under the FCC's current regime broadcasters and performers must concern themselves with the threat of an FCC investigation. Even when sanctions are not imposed, the cost of complying with an investigation may itself prove daunting. Moreover, this burden potentially extends beyond the broadcaster itself to

Faced with the threat of such expensive fines, radio and television programmers have shied away from certain programming in the wake of the FCC's change in policy. In September of 2006, on the fifth anniversary of the September 11, 2001 attacks, for example, CBS planned to air the documentary *9/11*, which included clips of the coverage of the events of that day. Because some of that coverage included audio of firefighters using expletives, and in the face of calls from the American Family Association urging that CBS forego or delay the broadcast, affiliates covering approximately ten percent of the United States decided not to broadcast *9/11* or to show it late at night. These affiliates cited concerns that they would otherwise be subject to FCC fines for broadcast indecency. *See* Lisa de Moraes, *Sunday Night Football Bulls Past 9/11 Programs*, Wash. Post, Sept. 12, 2006, at C7.

Likewise, radio broadcasts have been chilled by the FCC's indecency regulations. Some radio stations have stopped airing live performances and have abandoned live call-in formats for fear of FCC fines. *See* Mark Brown, *Broadcast words, actions stir efforts to clean up 'dirty' airwaves*, Rocky Mountain News, March 27, 2004, at 1D ("Virtually everything you hear on Denver airwaves now is either prerecorded or tape-delayed."); Paul Davidson, *Risque Business to Get 10 Times Riskier; Fine for TV, Radio Indecency to Rise to $325,000*, USA TODAY, June 8, 2006, at 1B (noting that Clear Channel radio stations cancelled Howard Stern's program because of the "government's indecency crusade"). In 2004, the Los Angeles National Public Radio affiliate KCRW even went so far as to fire Sandra Loh, whose monologues had been a "fixture on KCRW for six years," for uttering a single expletive. Greg Braxton, *KCRW fires Loh over obscenity*, L.A. TIMES, Mar. 4, 2004, at B1.

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any performers whom the FCC may wish to question or depose in relation to policies or events at issue.

B. Live Broadcasts Cannot Be Adequately Preserved By Tape Delays

No broadcaster can foresee every word that will be uttered in the live audio of a sporting event, a breaking news story, an awards show, or other such live broadcast events. Nor can any broadcaster predict what words might appear in live video on a sign, t-shirt, or other article of clothing in a live crowd shot, in-the-street or on-the-field interview. Thus, the only surefire way to remain on the safe side of the FCC's fleeting expletives policy is to refrain from live programming at all. The second-best is to employ a tape delay of all live broadcasts, but this device is costly and by no means foolproof.

To provide tape delays of live television, expensive and sophisticated recording and editing equipment is required to enable quick review and effective editing of any unexpected expletives. Because the tape delay equipment itself cannot recognize expletives, at least one person must operate the equipment and carefully monitor all live broadcasts in real time. Both the equipment and the manpower required to effectively employ a tape delay increase considerably the costs of providing a live broadcast.

Even if a tape delay is employed, there is no guarantee that human error will not occur, leaving the broadcaster exposed to sanctions despite good faith efforts to comply with FCC regulations. This was the case in two of the live broadcasts at issue here. At the 2002 Billboard Music Awards, Fox *did* employ a 5-second tape delay—but the monitor failed to catch Cher's fleeting expletive. *See Remand Order*, 21 F.C.C.R. at 13312-13 ¶ 34. At the 2003 Billboard Music Awards, Fox *again* employed a 5-second delay. The monitor effectively blocked Nicole Richie's first expletive, but could not block the next two because the three came in such quick succession. *See id.* at 13311 ¶ 32; Roger Parloff, *Bleep Deprivation*, Fortune, March 19, 2007, at 53. Thus, even when

broadcasters spend the money and effort to block fleeting expletives, their efforts are not always successful. Yet the FCC claims authority to impose sanctions notwithstanding broadcasters' best efforts. *See* 18 U.S.C. § 1464 (no provision to exempt broadcaster acting in good faith to comply).

In addition to the failures of tape delays to catch and block all fleeting expletives, tape delays are practically difficult to implement in certain live broadcast situations. For example, in many news reports, a reporter in the field is listening and responding to the live broadcast—not to a separate feed directly from the studio. Introducing even a brief tape delay would introduce long and distracting delays between the questions from the studio and the responses of the reporters in the field. The problem is even more intractable with respect to catching any stray visual expletive in crowd shots.

Tape delays are also practically unworkable in situations where a broadcaster is providing live coverage from multiple locations in a single broadcast. The careful synchronization required between locations would be severely complicated by tape delays. Additionally, it would be necessary to monitor all feeds on a tape delay, not just the one actually being broadcast at a given time, because the need to quickly switch to a different feed requires that the other feed also be "clean" at all times. Although it may be technically possible to achieve a tape-delayed, expletive-free broadcast in these special situations, the costs involved may seriously discourage broadcasters from continuing with such programming. If the costs prove too high, certain live programming will become economically infeasible.

Even if tape delays *could* be used in many live broadcasts, viewers often desire that "live" broadcasts be precisely that, not on a tape delay. For example, Tennessee Titans fans attending a game in 2006 were upset when a radio broadcast of the game lagged the action on the field by twelve sec-

onds—a delay that had been imposed by Citadel Broadcasting out of concern for compliance with the FCC regulations. *See* Mike Organ, *Titans fans rip radio delay of game: Fear of fine forces 12-second holdup*, Tennesean, Aug. 16, 2006, at 1C. Longer tape delays likewise result in viewer dissatisfaction.[6] Indeed, the FCC has previously recognized, for other purposes, that the demands of providing live sports coverage require special regulatory consideration. *See* 47 C.F.R. § 76.95(b) (2008) (excepting time immediately following live sports broadcast from non-duplication protection). Similar recognition is lacking from the sanction authority claimed here.

The threat of crippling fines under the fleeting expletives policy thus will induce broadcast stations to ratchet up tape delays or err on the side of abandoning live broadcasts altogether. The loss of such significant programming would seriously undermine First Amendment values.

IV. ADVANCES IN FILTERING TECHNOLOGIES ELIMINATE ANY NEED TO EXPAND THE FCC'S AUTHORITY BEYOND THE NARROW LIMITS SET FORTH IN *PACIFICA*

For the reasons explained above in Parts I and II, the FCC's current fleeting expletives policy is inconsistent with *Pacifica* itself, for *Pacifica* involved expletives that were neither fleeting nor subject to arbitrary and selective discretion. Nor did *Pacifica* consider clear evidence of self-censorship like that described above in Parts II and III. Thus even under *Pacifica*, avoidance of serious First Amendment questions

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[6] *See, e.g.*, Mark Starr, *Can Sasha Cohen Save the Olympics?*, Newsweek, Feb. 22, 2006, http://www.newsweek.com/id/57126 ("You don't like to see events on tape delay because if you are a real fan, it's hard to maintain your ignorance of the results."); Joachim Vosgerau et al., *Indeterminacy and live television*, 32 J. Consumer Research 487 (2006) (concluding that indeterminacy of live broadcasts results in consumer preference for live television over tape-delayed broadcasts).

counsels affirmance here. Should the Court consider reversal, however, necessarily expanding the permissible range of FCC authority beyond *Pacifica*'s scope, intervening technological changes would counsel against it.

The last thirty years have seen rapid development and proliferation of new media technologies. This Court has repeatedly affirmed that communications over these new media—in particular, cable television and the Internet—deserve full First Amendment protection from government censorship.[7] The Court has further recognized that less restrictive "opt-out" alternatives limiting the exposure of children to indecent speech on the back end are preferable to governmental restrictions imposed up front. These considerations make any expansion of *Pacifica* inappropriate.

A. Cable Television And The Internet Illustrate The Feasibility Of "Opt-Out" Technologies

This Court has consistently held that less restrictive alternatives empowering individuals to opt out from receiving unwanted speech are preferable to government censorship of speech in advance.[8] Opt-out has also been the norm for cable

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[7] In *United States v. Playboy Entertainment Corp.*, this Court held that, for "a content-based regulation" of cable television, "[t]he standard [of review] is strict scrutiny." 529 U.S. 803, 814 (2000). Likewise, in *Reno v. ACLU*, this Court noted that, because the "purpose" of the challenged regulation of internet speech was "to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech," the regulation was "a content-based blanket restriction on speech" warranting "application of the most stringent review." 521 U.S. 844, 868 (1997); *accord, Ashcroft v. ACLU*, 542 U.S. 656, 665-66 (2004).

[8] *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (recipients of unwanted speech may "effectively avoid further bombardment of their sensibilities simply by averting their eyes") (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)); *see also Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980) ("[T]he provision permitting homeowners to bar solicitors from their property by posting [no solicitation] signs . . . suggest[s] the avail-

television and the Internet: rather than permitting government censorship, this Court has looked to less restrictive technological alternatives through which parents could use self-help to block offending speech from the home.

In *United States v. Playboy Entertainment Corp.*, this Court recognized that content-based restrictions on speech over cable television are unsustainable when "[c]able systems have the capacity to block unwanted channels on a household-by-household basis." 529 U.S. 803, 815 (2000). "The option to block reduces the likelihood, so concerning to the Court in *Pacifica*, . . . that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem." *Id.* (internal cross-references omitted). Instead, the ability of parents to engage in "targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place for receipt." *Id.*

Likewise, in *Reno v. ACLU*, the Court pointed to user-based content-filtering software that would "soon be widely available" as a preferred alternative to government censorship of the Internet under the Communications Decency Act of 1996. 521 U.S. 844, 877 (1997). The Court reaffirmed its preference for opt-out filters in *Ashcroft v. ACLU*, upholding a lower court's grant of a preliminary injunction against the Child Online Protection Act (COPA) because "[f]ilters are less restrictive" than COPA, as "[t]hey impose selective restrictions on speech at the receiving end, not universal restrictions at the source." 542 U.S. 656, 667 (2004).

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ability of less intrusive and more effective measures to protect privacy" than a flat ban on such signs.); *accord, Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 168-69 (2002).

Although filtering capabilities were limited at the time of *Reno*, filtering software has greatly improved over the last decade. *See Updated Web Content Filtering Software Comparison*, conducted by eTestingLabs under contract from the U.S. Department of Justice, October 2001, *available at* http://www.surfonthesafeside.com/aboutcic/usdoj.pdf. In 2004, this Court recognized the improved effectiveness of filtering software, noting that "[f]ilters also may well be more effective than [the restrictions imposed by] COPA." *Ashcroft*, 542 U.S. at 667. Subsequent testing has confirmed that filtering software has become "better at blocking pornography," such that "[a]ll of the products tested" in a 2005 market study "were very good or excellent at blocking pornography," although some could be "heavy-handed" in blocking non-obscene material. *Filtering Software: Better, but still fallible*, Consumer Reports, June 2005, at 36.

These improvements in Internet filtering technology responded to the growth in parents' demand for filtering software. By 2005, fifty-four percent of Internet-connected families with teens—a total of twelve million users—used filtering software, a sixty-five percent increase from the total filter use in December 2000. Amy Lenhart, Pew Internet & American Life Project, *Protecting Teens Online* at i, 7-8 (2005), *available at* http://www.pewinternet.org/pdfs/pip_filters_report.pdf. This rapid adoption has effectively validated this Court's preference for market-based options for parental control over government censorship.

B. Filtering Options Are Also Increasingly Effective For Television Broadcasts

The "V-Chip" presents a similar opt-out alternative by which technology can enable parental control and limit broadcast speech in the home without sacrificing the First Amendment rights of speakers and willing audience members. In 1999 and 2000, the FCC implemented "rules requiring all television sets with picture screens 33 centimeters (13

inches) or larger to be equipped with features to block the display of television programming based upon its rating." FCC, *V-Chip: Viewing Television Responsibly*, http://www.fcc.gov/vchip. This device, commonly known as the V-Chip, "reads information encoded in the rated program and blocks programs from the set based upon the rating selected by the parent." *Id.*[9]

Parents who have used the V-Chip have found the technology to be useful for guiding their children's television choices. In a 2004 survey, sixty-one percent of parents who had ever used the V-Chip found it to be "very useful" and another twenty-eight percent of parents found to the technology to be "useful."[10] Reflecting growing awareness of V-Chip technology, the survey showed that by 2004, fifteen percent of parents had used the V-Chip, up from seven percent in 2001. *Id.* A 2007 study found two-thirds of parents reporting that they "closely" monitor their children's media use, and found that that use of the V-Chip has grown to six-

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[9] At present, the V-Chip implements a rating system known as the "TV Parental Guidelines" that the entertainment industries developed after Congress "gave the broadcasting industry the first opportunity to establish voluntary ratings" in § 551 of the Telecommunications Act of 1996. The guidelines provide age-based ratings similar to those used by the Motion Picture Association of America –TV-Y ("All children"), TV-Y7 ("Directed to Older Children), TV-G ("General Audience"), TV PG ("Parental Guidance Suggested"), TV-14 ("Parents Strongly Cautioned"), and TV-MA ("Mature Audience Only"). In addition, the guidelines provide for content-based indications for violence (V), sexual situations (S), crude, indecent, or coarse language (L), and suggestive dialogue (D). *Id.* Shows qualify for TV-14 or TV-MA ratings only if at least one content indications is applicable; TV-PG shows may carry content ratings if applicable.

[10] Kaiser Family Found., *Parents, Media and Public Policy* 7 (2004), *available at* http://www.kff.org/entmedia/7156.cfm

teen percent and significantly, nearly three out of four parents who had tried the V-Chip said they found it "very" useful.[11]

This positive response to the V-Chip from parents who have used it "would indicate that increased knowledge of the V-chip would substantially increase parents' perceptions of control over their children's television viewing." Patricia Moloney Figliola, Cong. Research Serv., *V-Chip and TV Ratings: Monitoring Children's Access to TV Programming*, at 8 (updated May 2, 2005), *available at* http://lieberman.enate.gov/ocuments/crs/vchipchildren.pdf. Parental awareness and use of the V-Chip may be increased by advertising, through "public service announcements on television, educational materials on the FCC website, and possibly public service advertisements in the print media." *Id.* at 9.

V-Chip penetration into the market will naturally increase for two reasons: First, all televisions larger than 13 inches built after 2000 must have a V-Chip. *See* FCC, *V-Chip: Viewing Television Responsibly*, http://www.fcc.gov/vchip. Second, because of the switch to all-digital broadcasts in 2009, owners of analog televisions will either have to replace their sets with new ones containing V-Chips or acquire digital-to-analog converter boxes, which, under FCC rules, must include V-Chip technology. *See Rules to Implement a Coupon Program for Digital to Analog Converter Boxes*, 72 Fed. Reg. 12097, 12106 & n.113 (March 15, 2007); *see also* Melissa J. Perenson, *CES Preview: TV Converter Boxes Offer Escape From Analog TV*, PC World, January 2, 2008, http://www.pcworld.com/article/140751/es_preview_tv_converter_boxes_offer_escape_from_analog_tv.html.

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[11] *See* Kaiser Family Found., *Parents Say They're Getting Control of Their Children's Exposure to Sex and Violence in the Media, available at* http://www.kff.org/entmedia/entmedia061907nr.cfm; Kaiser Family Found., Parents, *Media and Public Policy* 7 (2007), *available at* http://www.kff.org/entmedia/7638.cfm.

And the switch to digital broadcasting will open up opportunities for further improvement of the V-Chip. The original V-Chip could read only the TV Parental Guidelines and the MPAA ratings. Since 2006, however, the FCC has implemented rules that require digital television receivers to contain an "open V-Chip" that will be able to "respond to changes in the content advisory system" imposed on broadcasters, and will thus adjust to and reflect any future changes to the ratings system. *See* 47 C.F.R. § 15.120(d)(2) (2007); Bary Alyssa Johnson & Mark Hachman, *'V-Chip 2.0' Turns On In March*, PCMag.com, Feb. 3, 2006, http://www.pcmag.com/article2/0,1895,1930598,00.asp. More accurate ratings of programs and adoption of improved rating systems then would be feasible. Such ratings would, via the V-Chip, facilitate parental blockage of shows that contain or are likely to contain fleeting expletives.[12]

The V-Chip thus presents a developing alternative for parents to opt out from and to protect their children from receiving unwanted speech. The widespread adoption of content filtering on the Internet and the improvement of content-filtering technology in the years between *Reno* and *Ashcroft* offers a useful comparison. By declining to sanction government censorship of the Internet, this Court encouraged the market for opt-out alternatives for parents who wished to limit their children's access to harmful Internet speech. By

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[12] At any rate, there is evidence that the current ratings system is helping parents control their children's viewing choices. Not only do parents who use the V-Chip find it useful, but 88% of parents found the ratings systems by themselves to be "somewhat useful" or "very useful." Kaiser Family Found., *supra*, at 5. And even the evidence marshaled by the FCC states that there is "solid support for the conclusion that, in general, the age-based ratings are being applied in a way that reasonably reflects the content of those shows," and that "[o]n the whole, the industry's performance at applying the age-based rating system appears highly credible." Dale Kunkel et al., *Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 J. Comm. 112, 127 (2002).

declining to expand the FCC's special power to censor broadcasting beyond *Pacifica*, the Court would again encourage the market for and development of the V-Chip. Such a flexible alternative would facilitate parents' control over their children's television viewing even as the marketplace of speech runs its natural course between speakers and willing viewers and listeners, just as the First Amendment contemplates.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For the Second Circuit

Brief of *Amicus Curiae* Center for Constitutional Jurisprudence In Support of Petitioners

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QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. §1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

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INTEREST OF *AMICUS CURIAE* [1]

The Center for Constitutional Jurisprudence is an educational, litigation and advocacy program in constitutional law and jurisprudence located at Chapman University School of Law. Founded in 1999 as the public interest litigation arm of The Claremont Institute for the Study of Statesmanship and Political Philosophy, the Center provides legal representation and litigation support through the work of students and attorneys in cases of constitutional significance, advancing through its strategic litigation the Institute's mission of restoring "the principles of the American Founding to their rightful and preeminent authority in our national life."

SUMMARY OF ARGUMENT

The Federal Communications Commission has discovered, based on its own investigations and complaints from the public, that there has been an increase in the use of expletives and indecent language in the programming of licensed broadcasters. In response to these facts, and pursuant to its legal duty to implement the statutory ban on broadcast indecency in 18 U.S.C. §1464, the Commission has prop-

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[1] The Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief other than a grant for printing costs only from another *amicus*, the Alliance Defense Fund, with whom this brief was coordinated to avoid duplication of coverage.

erly revised its policies and enforcement protocols to provide for administrative action against those who broadcast single instances of indecent language in addition to the administrative actions already authorized against those who broadcast indecent language repeatedly in a single program.

Contrary to the holding of the plurality in the Court of Appeals decision below, this stronger enforcement of the law against broadcast indecency is a reasonable response to changed circumstances and the practices of broadcasters permitting increased use of indecent language in their programming and not an arbitrary change of policy. It is reasonable for the Commission to consider indecent language across the broadcast spectrum and not only repeated usage in single programs. This would be a proper exercise of the discretionary authority of the Commission even if it were only a revision of its practices and not a response to changed circumstances.

The regulations of the Commission permit indecent language to be broadcast without restraint for eight hours every night so that people are not denied access to this form of expression, which is also readily available through alternative channels of communication such as the Internet and cable television.

The Commission has also acted reasonably in taking the context of indecent language into account rather than attempting to impose a blanket ban on all indecent expression, as the plurality opinion below would require. Considering language according to its usage and in its context is a necessary and constitutionally accepted practice concerning sexually oriented and offensive speech, whether used sponta-

neously by people interviewed during live news programs, or in programming addressing language and cultural issues, or, for example, in the protection of otherwise obscene expression if its found to have serious literary, artistic, political or scientific value. Making such distinctions in context is as necessary and proper a judgment for regulatory officials as it is for judges. Use of such contextual standards does not render the law or the Commission's administrative regulations unconstitutionally vague or overbroad.

ARGUMENT

Section 1464 of Title 18 of the United States Code provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." This statutory mandate is enforced by the Federal Communications Commission. ("FCC" or "Commission") through regulations and adjudications. Concern for First Amendment principles of freedom of speech and the statutory ban against regulatory censorship[2] has led the Commission to enforce the statutory prohibition against indecent broadcast speech narrowly, by limiting the time of enforcement to daytime and evening hours only, for example, or by taking into account the context of the indecent expression, exempting expletives that are broadcast during live

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[2] "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C. §326.

news interviews or that are "integral" to an artistic expression. The Commission previously had a policy of not taking enforcement action against broadcast licensees responsible for isolated, non-repetitive incidents of broadcasting indecent speech—so-called "fleeting expletives"—but the increasingly common use of expletives and offensive language in programming broadcast by FCC-licensed radio and television stations led the Commission to reconsider its enforcement policies and procedures concerning "indecent" speech,[3] in fulfillment of its duty to implement the prohibition against broadcast indecency mandated by Section 1464. At issue in the present case is the decision of the FCC to hold broadcast licensees responsible for "fleeting expletives."

The Court of Appeals below ruled that the revised broadcast indecency regulations promulgated by the FCC violate the Administrative Procedures Act, finding that the regulations are unreasonable, arbitrary and capricious. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454-462 (2d Cir. 2007). Far from being unreasonable, arbitrary and capricious, the FCC's new regulations are a perfectly rea-

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[3] "The Commission has regulated the broadcast of indecent programming for decades, and our authority in this area has long been upheld as constitutional by the U.S. Supreme Court. During the last few years, however, we have witnessed increasing public unease with the nature of broadcast material. . . . [¶] In these decisions, we address hundreds of thousands of complaints alleging that various broadcast television programs aired between February 2002 and March 2005 are indecent, profane, and/or obscene." *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005* (Omnibus Order), 21 F.C.C.R. 2664, ¶¶ 1-2 (2006).

sonable, and constitutionally permissible, response to the new reality that indecent expression is more and more being broadcast throughout the day, even when not repeated during single program broadcasts

This case raises constitutional concerns for freedom of expression as well as regulatory issues, but a full First Amendment analysis of the Commission's revised rules for indecent broadcast speech is not appropriate at this stage of the litigation, since the Court of Appeals plurality opinion expressly declined to rule on the merits of the constitutional arguments[4] and the petition for review filed by the FCC and accepted for hearing by the Supreme Court states its limited issue in terms solely pertaining to regulatory authority. Nevertheless, some First Amendment principles bear on the scope of the Commission's exercise of its regulatory authority and should be acknowledged even in this limited context, and it should be noted also that although the Court of Appeals plurality declared that it was not deciding the constitutional issues, its opinion addresses the First Amendment elements of the case in considerable detail, in support of its administrative law ruling. *Fox Television Stations*, 489 F.3d, at 462-466.

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[4] "'A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.' *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). Thus, we refrain from deciding the various constitutional challenges to the Remand Order raised by the Networks." *Fox Television Stations*, 489 F.3d, at 462.

I. Stronger Administrative Enforcement of the Ban Against Broadcast Indecency is a Reasonable Exercise of FCC Regulatory Authority in the Face of Increasingly Common Use of Indecent Language Over the Public Airwaves.

Until the new FCC regulations that are the subject of this litigation were adopted, the FCC narrowly enforced the statutory ban against indecent broadcast speech by targeting only incidents of indecent expression repeated during a single broadcast program, not single, isolated instances of "fleeting expletive." The premise for this narrow enforcement was that use of such language by licensed broadcasters was an occasional, unintentional phenomenon, sufficiently rare that it could be controlled by restricting only repetitive use of such language in a single entertainment program. Because the use of indecent language has become increasingly common throughout the broadcast day, however, it has become increasingly clear that the old premise is not longer true. Accordingly, the FCC adopted new regulations to respond to the new circumstances and thereby better enforce the statutory ban on the broadcast of indecent language.

The plurality opinion of the Court of Appeals in this action objected to the change of policy of the FCC to include enforcement against non-repetitive, "fleeting expletives" on the ground that there was no "reasoned basis justifying the Commission's new rule." *Fox Television Stations*, 489 F.3d, at 458. Specifically, the plurality rejected the judgment of the Commission that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces

viewers (including children) to take 'the first blow.'" *Id.* (quoting *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8,* 2005, Remand Order, ¶25, FCC 06-166 (Nov. 6, 2006)).

The phrase, "Taking the first blow," is from *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978),[5] in which Justice Stevens, writing for the Court, described the impact of indecent broadcast speech as follows:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. *To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.* One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Pacifica, 438 U.S., at 748-749 (emphasis added). The concurring opinion of Justice Powell, joined by Justice Blackmun, offered the same assault analogy to describe indecent expression broadcast into the home:

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[5] *Pacifica* involved a Commission adjudication rather than a rule-making procedure. The Supreme Court upheld the finding of the Commission that the radio broadcast of a recording of George Carlin's "Filthy Words" monologue in the afternoon violated the statutory ban in 18 U.S.C. §1464 against broadcast indecency. 438 U.S., at 734.

> A second difference, not without relevance, is that broadcasting—unlike most other forms of communication—comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. *Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, a different order of values obtains in the home.* . . . The Commission also was entitled to give this factor appropriate weight in the circumstances of the instant case.

Pacifica, 438 U.S., at 759 (Powell, J., concurring in part and concurring in the judgment) (emphasis added).

Contrary to this Court's decision in *Pacifica*, the plurality in the Court of Appeals below asserted that listeners and viewers of indecent broadcast speech are not entitled to protection against a "first blow" of offensiveness, not based on an evidentiary or legal finding of its own that the "first blow" phenomenon of verbal assault does not exist, but rather based on the simple fact that the FCC did not take enforcement actions against isolated incidents of indecent speech "for the nearly thirty years" between *Pacifica* and its current rule-making. The plurality could not see any justification for the regulatory change:

> More problematic, however, is that the "first blow" theory bears no rational connection to the Commission's actual policy regarding fleeting expletives. As the FCC itself stressed

> during oral argument in this case, the Commission does not take the position that any occurrence of an expletive is indecent or profane under its rules. For example, although "there is no outright news exemption from our indecency rules," Remand Order, at ¶ 71, the Commission will apparently excuse an expletive when it occurs during a "bona fide news interview."

Fox Television Stations, 489 F.3d, at 458.

But the "first blow" rationale against having to absorb the initial impact of hearing unwanted indecent speech clearly has a rational basis. Prerecorded entertainment programming, commercials, professional on-air speakers and hosts of call-in programs with typical 7-second delay broadcasting equipment and microphone "kill" buttons all can be trained in practices to avoid the broadcast of indecent speech over the public airwaves. It is rational to protect listeners and viewers from calculated and premeditated "first blow" verbal assaults from such people and their programs, especially since the past failure of the FCC to respond effectively to individual incidents of broadcast indecency following *Pacifica* evidently emboldened broadcasters and led some to engage more freely in repetitive but discontinuous verbal assaults throughout their broadcast programming.

On the other hand, it is also rational to overlook spontaneous expletives by people being interviewed during live news coverage. Such individuals are typically not trained professionals, their language is integral to the live news event being reported, and

they cannot control whether their comments will be aired on repeated in subsequent broadcasts.

It would likewise be rational to overlook or to treat lightly an occasional, unintentional slip-up by a professional broadcaster, precisely because the "first blow" then is not like a deliberate assault but more like someone accidentally stumbling and bumping into you on the street. You have no reason to expect the culprit to get up and bump into you again and again, so you call it an accident, he or she apologizes, and the incident goes no further. But if the same broadcast licensees do constantly bump into innocent people with their indecent language, not by stumbling in their speech but by intending to assault their unsuspecting listeners and viewers, then they should be held responsible for their misconduct and deliberate violations of the statutory ban.

It is also rational to recognize the context of speech and the circumstances surrounding broadcasts in which expletives or other indecent language may occur in forms that are integral to the programming content and that have redeeming social value. The law already makes such contextual distinctions concerning speech containing references to sexual and excretory topics, which are the focus of the FCC indecency regulations and the enforcement action at issue. Context and usage make a difference. For example, sexually explicit language that is otherwise obscene and unprotected is not deemed to be legally obscene, and receives constitutional protection, when, taken in context and as a whole, it exhibits "serious literary, artistic, political or scientific value." *Miller v. California*, 413 U.S. 15, 23-24 (1973).

An apparent pattern of increased repetition of indecent language in broadcasting justifies the FCC regulations at issue. The FCC deals with licensees and their whole gamut of broadcasting content, not just with isolated programs, and it is reasonable for the FCC to modify its regulations and their enforcement to adjust to the changing patterns and frequency of broadcast indecency.

II. The FCC Time-of-Airing Constraint on Broadcast Indecency Demonstrates a Reasonable Exercise of Agency Discretion in the Adoption of Time, Place and Manner Regulations That Leave Open Adequate Alternative Channels of Communication.

Under current FCC regulations, indecent speech is not constrained or prohibited during nighttime broadcasts. FCC regulations enforce the ban against indecent language only during the hours of 6:00 a.m. to 10:00 p.m., in part to protect children from inadvertent exposure to detrimental moral influences that are not age appropriate. 47 C.F.R. §73.3999(b). But for eight (8) hours out of every 24-hour day, from 10:00 p.m. to 6:00 a.m., indecent speech can be broadcast without regulatory restraint.

In *Pacifica Foundation*, this Court implicitly upheld time-shifting of indecent speech to the nighttime hours as a proper exercise of authority by the Commission and consistent with First Amendment principles. The decision in *Pacifica* was premised on acceptance of the statement of the Commission that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children

most likely would not be exposed to it." *Pacifica*, 438 U.S., at 733 (quoting *In the Matter of a 'Petition for Clarification or Reconsideration' of a Citizen's Complaint against Pacifica Foundation, Station WBAI(FM), New York, N.Y.*, 59 F.C.C.2d 892 (1976)). This Court expressly refused to hold that broadcast of the Carlin monologue would be indecent if broadcast in the "late evening," *id.*, at 750 n. 28, and the opinion made repeated references to the importance of the fact that its decision was based on the program "as broadcast," *id.*, at 732, 734, 735, and specifically that the indecent broadcast was aired in the "afternoon," *id.*, at 729, 738, 739, 747.

The concurring opinion of Justice Powell similarly emphasized the time-shifting nature of the Commission's regulatory action approved by this Court.

> The issue, however, is whether the Commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. See 56 F.C.C.2d, at 98. In my view, this consideration provides strong support for the Commission's holding.

Pacifica, 438 U.S., at 757 (Powell, J., concurring in part and concurring in the judgment).

By accepting the time-shifting nature of the Commission's adjudication, this Court in *Pacifica* avoided having to address the more substantive constitutional question of whether a total ban on indecent broadcasting would violate the First Amendment. *Compare Action for Children's Television v. F.C.C.*, 932 F.2d 1504, 1508-1509 (D.C. Cir. 1991) ("ACT II") (holding that the "safe harbor" for broadcast of indecent speech outside the 6:00 a.m. to 10:00 p.m. time period is constitutionally required under the First Amendment).

The FCC time regulations at issue here advance free speech and First Amendment interests by leaving open adequate channels of communication for indecent speech during the alternative broadcast time periods and by alternative media, such as the Internet and paid cable television.

This Court has not applied a strict scrutiny standard of review when analyzing content-based regulations in the context of radio and television broadcasting. As Justice Brennan, writing for the Court, noted in *FCC v. League of Women Voters*:

> [B]ecause broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve "compelling" governmental interests.

FCC v. League of Women Voters, 468 U.S. 364, 376 (1984). Instead of strict scrutiny, this court used an intermediate standard of review, analyzing whether the speech restriction at issue, editorializing by

broadcast licensees, was "narrowly tailored to further a substantial governmental interest." 468 U.S., at 380.

The speech in *League of Women Voters* was highly valued constitutionally[6]—the right to speak out editorially on matters of public interest—but it received only intermediate scrutiny review because it was in the context of broadcasting. Indecent speech, by contrast, is considered by this Court to be of very low value constitutionally and entitled only to minimal protection,[7] because of the unique features of the broadcast media:

> Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special con-

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[6] "[T]he restriction . . . is specifically directed at a form of speech—namely, the expression of editorial opinion—that lies at the heart of First Amendment protection." *League of Women Voters*, 468 U.S., at 381.

[7] "[T]he Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, *they surely lie at the periphery of First Amendment concern*." *Pacifica*, 438 U.S., at 743 (emphasis added).

> cern to the Commission as well as parents is the first point regarding the use of radio by children.

Pacifica, 438 U.S., at 731 n.2 (citations and quotation marks omitted).

"[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.*, at 748. After all, radio and television broadcasters require a government license, a limitation on free speech that would be unconstitutional in almost any other context.

In *Pacifica,* this Court treated the FCC's broadcast indecency time-shifting requirement as a reasonable content-neutral time, place and manner regulation, even though the regulation is marginally content-based, triggered by the indecent language. This Court found that the reason for the regulation was to not to censor speech but to prevent a "nuisance," and that the cause of the nuisance was that the indecent speech at issue was being broadcast at the wrong time, the daytime, and in the wrong place, the home, where children may be present:

> The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote a "nuisance may be

> merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."

Pacifica, 438 U.S., at 750 (emphasis added, footnote and citation omitted). On the basis of this analysis, the Court upheld the regulatory power of the FCC over indecent speech. *Id.*

Similar concerns about the impact of speech (its "secondary effects") rather than its content, even though the speech causing the undesirable social effects is identified by its content,[8] were held to justify reasonable time, place and manner regulations in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-50 (1986). "[T]he government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated." *Id*, at 50.

Recognition of the existence of alternative channels of communication supported the FCC time-of-airing restrictions on indecent speech in *Pacifica* as well:

> The Commission's action does not by any means reduce adults to hearing only what is fit for children. Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words.

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[8] "Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, *even though the determination of whether a particular film fits that characterization turns on the nature of its content*, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71-72 (1976) (emphasis added).

> In fact, the Commission has not unequivocally closed even broadcasting to speech of this sort. . . .

Pacifica, 438 U.S., at 750, n.28 (citation omitted). Likewise, Justice Powell, joined by Justice Blackmun, noted in his concurring opinion that:

> The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion. On its face, it does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the contemporary use of language at any time during the day.

Pacifica, 438 U.S., at 760 (Powell, J., concurring in part and concurring in the judgment).

The expansion of cable television, the alternative media and the Internet make the alternative channels of communication argument even stronger today.

III. Distinguishing Speech Based on Context Is Consistent with the Authority of the Commission and Does Not Violate First Amendment Principles Against Vagueness or Overbreadth.

The Court of Appeals plurality opinion found the FCC indecent language regulations to be irrational, arbitrary and capricious in part on the ground that

all expletives and indecent expression are not equally prohibited *See Fox Television Stations*, 489 F.3d, at 458 ("[T]he Commission does not take the position that any occurrence of an expletive is indecent or profane under its rules").

The FCC exempts "bona fide news interview[s]" and, as the Fox Television Stations plurality opinion notes, even the indecent language at the core of this case, from the Billboard Music Awards shows, could be re-broadcast in a news program about this FCC litigation and that re-broadcast, as news, would not violate the FCC regulations.[9] The FCC also does not treat as indecent language otherwise objectionable when its use is "integral" to the work presented, such as in the broadcast of the war movie "Saving Private Ryan." *Id.*[10]

This artificial all-or-nothing contention by the Court of Appeals plurality actually would mean that all indecent speech must be permitted, because the alternative, of permitting no indecent speech under any circumstances, would almost certainly be unconstitutional. *See, e.g., ACT II*, 932 F.2d, at 1508-1509.

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[9] "The Commission even conceded that a re-broadcast of precisely the same offending clips from the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC, even though in those circumstances viewers would be subjected to the same 'first blow' that resulted from the original airing of this material." *Fox Television Stations*, 489 F.3d, at 458.

[10] *In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507 (2005).

Context and usage are valid and important considerations to take into account constitutionally. As noted, sexually explicit expression that appeals to the prurient interest, that is patently offensive by contemporary community standards and that is declared to be illegal under applicable state law may, because of its context and usage, nevertheless be held to be constitutionally protected and not obscene, if it is found to have serious literary, artistic, political or scientific value. *Miller*, 413 U.S., at 15, 23, 24.

Not only may potentially obscene sexual content achieve constitutional protection if it is found to have serious literary, artistic, political or scientific value, but the same sexual content may be obscene in one context yet constitutionally protected in another, according to different local community standards, that is, according to its geographical and cultural context. "There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 125-126 (1989).

Context has always been recognized as being a factor in determining whether speech is constitutionally protected or not, as this Court noted nearly a century ago in *Schenck v. United States*:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most

> stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Schenck v. United States, 249 U.S. 47, 52 (1919) (citations omitted).

The vagueness and overbreadth arguments turn on the erroneous contention that treating the same language as indecent in one context but not in another necessarily means that a person cannot know what the law requires (that is, the regulation is vague) or the law is prohibiting speech in some contexts that it protects in others (that is, the regulation is overbroad).

In *Action for Children's Television v. F.C.C.*, 852 F.2d 1332 (D.C.Cir. 1988) ("ACT I"), the Court of Appeals reviewed an earlier expansion by the FCC of its enforcement authority over broadcast indecency, and in an opinion written by then Circuit Court Judge Ruth Bader Ginsberg, the Court upheld the FCC's case-by-case, contextual approach to broadcast indecency against challenges of vagueness and overbreadth.

First, the Court held that this Court's decision in *Pacifica* had already addressed and rejected the broadcasters' vagueness claim:

> The generic definition of indecency now employed by the FCC is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case. However, the Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague. The Court did hold the Carlin monologue indecent within the meaning of section 1464. We infer from this holding that the Court did not regard the term "indecent" as so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application."

ACT I, 852 F.2d, at 1338-1339.

Second, the demand of the opponents of the broadcast indecency regulations in *ACT I* was that to avoid unconstitutional overbreadth, the FCC had to provide a blanket exception for material that uses indecent language but that has "serious merit," 852 F.2d, at 1339, that is, to require the FCC to consider content and context, the very factors that the opinion below now claims cause overbreadth. The difference is that in *ACT I* the opponents wanted a rule that any expression that has serious merit must be exempted from the broadcast indecency standards for all times and places, whereas the FCC then, as now, asserted that contextual factors, such as the time of day, the presence of children, and similar concerns, impact whether a given form of expression is inde-

cent. The Court upheld the FCC's contextual approach:

> Some material that has significant social value may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking such value. Since the overall value of a work will not necessarily alter the impact of certain words or phrases on children, the FCC's approach is permissible under controlling case law: merit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material per se not indecent.

ACT I, 852 F.2d, at 1340.

The analysis of the vagueness and overbreadth challenges to the Commission's regulatory authority over broadcast indecency in *ACT I* remains sound and supports the petition of the Commission in this action.

CONCLUSION

The Federal Communications Commission has acted within its authority, pursuant to its statutory duty and consistent with constitutional principles in responding to the rising trend of broadcast indecency by its licensees, and the contrary decision of the Court of Appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICI CURIAE* CENTER FOR DEMOCRACY & TECHNOLOGY AND ADAM THIERER, SENIOR FELLOW WITH THE PROGRESS & FREEDOM FOUNDATION (PFF) AND THE DIRECTOR OF PFF'S CENTER FOR DIGITAL MEDIA FREEDOM IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Center for Democracy & Technology (CDT) is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's staff has conducted extensive policy research, published academic papers, and testified before Congress on the impact of content regulations on freedom of expression and the availability of alternative methods, including user empowerment technology tools, for protecting individuals who use the Internet.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici urge this Court to affirm the Second Circuit's decision holding that the Federal Communications Commission (FCC) violated the Administrative Procedure Act's (APA) prohibition against "arbitrary and capricious" agency action[2] when the Commission began sanctioning "fleeting expletives" without articulating a reasoned basis for this significant change in its broadcast indecency enforcement policy. In this brief, *amici* address three reasons the Second Circuit should be affirmed, the first relating to the vanishing constitutional underpinnings for any FCC regulation of broadcast indecency, the second relating to the FCC's gross manipulation of the complaints it received to create a justification for increased indecency enforcement, and the third relating to the FCC's inconsistent analysis of what is "indecent":

I. In considering the APA issues, *amici* respectfully submit that this Court must also consider the larger context of the modern media environment, which starkly calls into question the FCC's underlying constitutional authority—based on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)—to regulate

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[2] Under the Administrative Procedure Act, a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions" if the court finds them to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)A).

speech that, when communicated via any medium other than broadcast, is fully protected by the First Amendment. Petitioners here defend the FCC's actions based on and with reference to *Pacifica*, *see* Pet. Br. at 24-26, 31-32, yet the factual and legal underpinnings of that decision are withering.

Pacifica is based on an archaic and static understanding of the facts about broadcast television. The state of media and technology today directly challenges this Court's assumption—an assumption etched into precedent 30 years ago—that broadcast is a unique medium deserving something less than full First Amendment protection, and therefore "indecent" broadcast content can appropriately be regulated by the government. As the Second Circuit observed, "technological advances may obviate the constitutional legitimacy of the FCC's robust oversight." Pet. App. at 43a. Such technological advances include the dramatic increase in the availability of "user empowerment" tools, and the proliferation and convergence of various entertainment and communications media. And critically, as media technologies converge, the full First Amendment protection afforded the Internet in *Reno v. ACLU*, 521 U.S. 844 (1997), should control the Court's analysis of content regulation in the converged environment.

This Court can affirm the court below without reaching the substantive issues surrounding *Pacifica* and the rationales underlying modern FCC indecency

enforcement. If, however, the Court does speak to those issues, it is vital that it recognize the radical changes that have taken place since *Pacifica* was handed down three decades ago and how those changes have completely undercut the logic of that decision. *Pacifica*'s "pervasiveness" doctrine, with its "intruder-in-the-home" logic, now represents a legal relic of a bygone media and regulatory era.

II. The FCC before coming to this Court—and *amici* in support of the FCC in this Court—justified the radical expansion of FCC indecency enforcement based on an asserted increase in the number of complaints it received about broadcast programming. That increase, however, is primarily a result of a concerted manipulation of complaint statistics—in violation of the APA—and does not, in any event, substitute for the constitutionally required analysis of "community standards." Moreover, the FCC's treatment of indecency complaints from a vocal minority group has allowed a "heckler's veto" in violation of the First Amendment.

III. The FCC's inconsistent and arbitrary analysis of what is "indecent" violates both the First Amendment and the APA. By regulating similar terms quite differently, the FCC fails to provide speakers with clear policy guidance, as is statutorily and constitutionally required.

ARGUMENT

I. ADVANCES IN MEDIA TECHNOLOGY OBVIATE THE NEED FOR HEAVY-HANDED GOVERNMENTAL REGULATION OF BROADCAST INDECENCY.

Technology is transforming how society receives information and entertainment, and it is also transforming how First Amendment principles apply to content delivery.

A. Strict Scrutiny Must Be Applied to the FCC's Regulation of Indecency Because Broadcast Is No Longer an Uncontrollable "Intruder" Into the Home That Is Easily Accessible By Children.

As the Second Circuit noted below, "[o]utside the broadcasting context, the Supreme Court has consistently applied strict scrutiny to indecency regulations." Pet. App. at 39a. The First Amendment generally prohibits the regulation of speech based on content, and even "indecent" speech has inherent First Amendment protection. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). But in *Pacifica* this Court—without expressly adopting a less-than-strict level of scrutiny—appeared to afford a lower level, holding that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection," and thus the FCC may legally censor broadcast content that is indecent yet otherwise legal.

Pacifica, 438 U.S. at 748. In applying a lower First Amendment standard, the *Pacifica* Court upheld the Commission's assertion that George Carlin's "Filthy Words" monologue was actionably indecent.

The *Pacifica* Court justified such limited First Amendment protection by what it understood as the "unique" two-pronged nature of broadcast at the time: broadcast 1) was a "pervasive" and uncontrollable medium that intruded into the privacy of the home, and 2) was easily accessible by children. *Id.* at 748-50. *See also Reno*, 521 U.S. at 869 (concluding that the Internet is not "invasive," contrasting *Pacifica*). The particular concern about the "pervasiveness" or "invasiveness" of broadcast was the fact that when one turns on a television or radio, whatever is being broadcast at that moment, including that which might be indecent or offensive, will be seen or heard.

But that was 1978. Three decades later, technological advances are rapidly undermining these two factual assumptions that form the basis of the FCC's legal authority to censor broadcast indecency. "User empowerment" tools for television, such as the V-Chip and digital video recorders (DVRs), enable parents to control what television content "enters" the home. Beyond technological tools, household usage rules help families interact with television and other media in ways that reflect their personal values. These developments diminish any significant reason to place broadcast speech in a separate category

deserving something less than maximum First Amendment protection.

In the modern media environment, strict scrutiny should be applied to the FCC's regulation of indecent content transmitted via broadcast television. As the Second Circuit stated, "it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television." Pet. App. at 40a-41a.

Amici respectfully submit that the time is rapidly approaching for this Court to find that broadcast, like the Internet and other means of mass communication, "is entitled to the highest protection from government intrusion" and that there is no longer a factual "basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno*, 521 U.S. at 863, 870 (analyzing the state of technology in deciding what level of scrutiny to apply to the Internet).

The application of strict scrutiny would lead to the conclusion that the FCC's regulatory regime cannot pass constitutional muster—that its censorship of broadcast indecency is not narrowly tailored to serve a compelling government interest (*i.e.*, protecting children from unsavory content) because there are other less restrictive means (*i.e.*, user empowerment tools) to achieve this goal. *See Sable*, 492 U.S. at 126.

B. User Empowerment Tools for Broadcast Television Enable Parents to Control What Television Content "Enters" the Home and Are Thus Least Restrictive Means to Shield Children From Unwanted Content.

Parents have a variety of technological tools, including the V-Chip[3] and digital video recorders

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[3] The V-Chip has been installed in all 13-inch or larger televisions manufactured since 2000 and allows parents to block certain broadcast content based on a series of ratings. The ratings system offers the following age-based designations:

"TV-Y" – All Children
"TV-Y7" – Directed to Children Age 7 and Older
"TV-Y7 (FV)" – Directed to Older Children Due to Fantasy Violence
"TV-G" – General Audience
"TV-PG" – Parental Guidance Suggested
"TV-14" – Parents Strongly Cautioned
"TV-MA" – Mature Audience Only

The TV ratings system also uses several specific content descriptors to better inform parents and all viewers about the nature of the content they will be experiencing. These labels include:

"D" – Suggestive Dialogue
"L" – Coarse Language
"S" – Sexual Situations
"V" – Violence
"FV" – Fantasy Violence

See http://www.tvguidelines.org/ratings.htm. These ratings are displayed prominently at the beginning of programs, in on-screen menus and interactive guides, and in local newspaper or TV Guide listings.

(DVRs), with which to guide their children's development and television viewing habits. The FCC and *amici* in support of Petitioners have attempted, without adequate foundation, to attack the effectiveness of the V-Chip. *See* Pet. App. at 109a n.159.[4] However, the legal significance of user empowerment technologies as less restrictive alternatives to government regulation is not diminished because they must be applied by parents (as with the V-Chip), or some parents choose not to use them, or they are not perfect at all times.

This Court has held that governmental action to promote voluntary efforts by parents to protect their children from sexual content is a less restrictive alternative to blocking mandated by statute. *See, e.g., U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 827 (2000). In *Playboy*, the Court held that a statute requiring cable companies to scramble sexually explicit programming was unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon requests by parents. *Id.* at 822. As the Court observed, "targeted blocking [initiated by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815. The Court noted,

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[4] *See also* Brief of *Amicus* Decency Enforcement Center for Television, at 34-35; Brief of *Amici* American Academy of Pediatrics, *et al.*, at 17.

> [I]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

Id. at 824.[5]

Beyond the V-Chip, many American homes now rely on a variety of alternative technologies and methods to filter or block unwanted broadcast programming. This is especially the case for 86% of U.S. households subscribing to cable or satellite television systems (discussed *infra* Part I.C.1.), which offer more robust filtering and blocking capabilities than the V-Chip. Pet. App. at 106a-107a.[6] In the

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[5] In overturning another content regulation statute—the Child Online Protection Act (COPA)—the Third Circuit Court of Appeals followed this Court's lead and held that Internet content filters are both more effective and less restrictive than COPA. *American Civil Liberties Union v. Mukasey*, No. 07-2539, at 49-50 (3d Cir. July 22, 2008). The appeals court emphasized that "filters are more flexible than COPA because parents can tailor them to their own values and needs and to the age and maturity of their children and thus use an appropriate flexible approach differing from COPA's 'one size fits all' approach." *Id.* at 49.

[6] Indeed, it was these user controls that led the *Playboy* Court to find "a key difference between cable television and the

decades since *Pacifica*, market forces have produced a range of more effective solutions than the government-mandated V-Chip.

The critical development in this regard has been the rapid rise of viewer empowerment technologies such as VCRs, DVD players, digital video recorders (DVRs), and video on demand (VOD) services. These technologies give parents the ability to accumulate libraries of preferred programming for their children and determine exactly when that programming will be viewed. Using these tools, households can tailor media consumption to their specific needs and values. Parents can amass libraries of programming they believe is educational, enriching, and appropriate for their children, and only allow them to view it when they feel it is appropriate—in sharp contrast to the "invasiveness" of broadcast television at the time *Pacifica* was decided in 1978. Indeed, these new technologies are so effective in empowering parents that one *amicus* supporting the government in this case proudly (and in light of its *amicus* brief, ironically) tells its members that "[w]ith TiVo KidZone and the PTC *you'll never have to worry again* about what your children are watching on TV."[7]

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broadcasting media," and to apply strict scrutiny. *Playboy*, 529 U.S. at 815.

[7] On its website, the Parents Television Council boldly proclaims:

> Finding family-friendly programming has never been easier. With TiVo KidZone, PTC-recommended

Ownership of these viewer empowerment tools is rapidly increasing as their costs plummet. The Consumer Electronics Association (CEA) estimates that 85% of U.S. households have at least one VCR, down from a high of 91% in 2005. The number of VCRs in homes is declining steadily as consumers replace them with DVD players and DVD recorders; 83% of households have at least one DVD player, up from 13% in 2000.[8]

DVRs and VOD are experiencing similar growth. According to market research, more than one in five U.S. households now has a DVR, up from about one in every 13 households just two years ago, and approximately 50% of all homes will likely have a DVR by 2011.[9] Meanwhile, "nearly 90% of U.S. digital cable subscribers had access to VOD, and 46% of all basic cable customers were offered the service"

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programming is always at your fingertips. With TiVo KidZone and the PTC *you'll never have to worry again* about what your children are watching on TV.

http://www.parentstv.org/store/default.asp (emphasis added). The PTC also touts other user empowerment tools such as SkyAngel, Clear Play, and Power Cop. The strong endorsement of a range of technology solutions is in stark contrast to the PTC's assertion to this Court. *See* Brief of *Amicus* Parents Television Council, at 13 ("the technology available does not work").

[8] Consumer Electronics Association, U.S. Consumer Sales and Forecasts, 2003-2008 (July 2007).

[9] Leichtman Research Group, "DVRs Now In Over One of Every Five U.S. Households" (Aug. 21, 2007), http://www.leichtmanresearch.com/press/082107release.html.

as of March 2007.[10] And Pike & Fischer estimates that each home will be watching nearly two hours of on-demand content nightly by the end of 2012.[11]

Soon, almost any family that wants these technologies—unimaginable in 1978—will find them within their reach. The CEA estimated that in 2008 the average price of VCRs will fall to $46 and DVD players to $90, approximately a 27% price drop for both technologies since 2003, and that the average price of DVRs will fall to $160 this year.[12] Already, TiVo's most popular DVR is just $99.99, down significantly from their top-of-the-line DVRs, which were selling for well over $1,000 a few years ago. In light of the hundreds (even thousands) of dollars families spend to bring television sets in the home, the expense of these parental control tools seem quite reasonable in comparison. Moreover, most video service providers now offer DVR functionality bundled into their cable and satellite set-top boxes.

Beyond the V-Chip and DVR technology, there are a variety of other technologies that allow parents to

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[10] SNL Kagan, "VOD Availability Grows with Digital Platform," VOD & ITV Investor, No. 106 (May 30, 2007), at 6, www.snl.com/products/samples/media_comm/kvi/sample1.pdf.

[11] Scott Sleek, "Video on Demand Usage: Projections and Implications," Pike & Fischer (Oct. 2007), http://www.broadbandadvisoryservices.com/researchReportsBriefsInd.asp?repId=541.

[12] Consumer Electronics Association, U.S. Consumer Sales and Forecasts, 2003-2008 (July 2007).

control the viewing of content historically delivered by broadcast.[13] Cable and satellite television offer robust parental controls: set-top boxes offer locking functions for individual channels, preventing children from accessing the channels or programs without a password,[14] and parental controls are also usually just one button-click away on most cable and satellite remote controls.[15] Specialized remote controls can also limit children to channels approved by the parents.[16] Independent screening tools like

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[13] All of these technologies were extensively detailed in comments filed on remand with the FCC by *amicus* Adam Thierer. *See* Adam Thierer, "The Current State of Parental Controls (and What it Means For This Debate)," *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005; Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints* (Sept. 21, 2006), http://www.pff.org/issues-pubs/filings/2006/092106thierer_FCC_parentalcontrols.pdf.

[14] A comprehensive survey of the content controls that cable television providers make available to their subscribers can be found on the "Control Your TV" website of the National Cable and Telecommunications Association. *See* http://controlyourtv.org/.

[15] A new industry sponsored campaign entitled "The TV Boss," http://www.thetvboss.org/, offers easy-to-understand tutorials explaining how to program the V-Chip or cable and satellite set-top box controls. As part of the effort, several public service announcements and other advertisements have aired or been published reminding parents that these capabilities are at their disposal.

[16] *See* http://weemote.com/.

TVGuardian offers a "Foul Language Filter" that can filter out profanity (even from broadcast signals) based on closed captioning.[17]

Moreover, many households feel that they can forgo technological controls altogether and instead rely on household media consumption rules.[18] Some of these can be "formal" in the sense that parents make the rules clear and enforce them routinely in the home over a long period of time. Other media consumption rules can be fairly informal, however, and be enforced on a more selective basis. Regardless, most parents enforce such guidelines. A 2003 Kaiser Family Foundation survey found that "[a]lmost all parents say they have some type of rules about their

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[17] *See* http://tvguardian.com/.

[18] Other courts have recognized that this is also the case in other contexts. As the Third Circuit Court of Appeals recently noted in the latest COPA appeal:

> Though we recognize that some of those parents may be indifferent to what their children see, others may have decided to use other methods to protect their children—such as by placing the family computer in the living room, instead of their children's bedroom—or trust that their children will voluntarily avoid harmful material on the Internet. Studies have shown that the primary reason that parents do not use filters is that they think they are unnecessary because they trust their children and do not see a need to block content.

American Civil Liberties Union v. Mukasey, No. 07-2539, at 49-50 (3d Cir. July 22, 2008).

children's use of media."[19] A 2006 Kaiser survey of families with infants and preschoolers revealed that 85% of those parents who let their children watch TV at that age have rules about what their child can and cannot watch. And 63% of those parents say they enforce those rules all of the time.[20] About the same percentage of parents said they had similar rules for video game and computer usage.[21]

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[19] Kaiser Family Foundation, *Zero to Six: Electronic Media in the Lives of Infants, Toddlers and Preschoolers*, at 9 (Oct. 28, 2003), http://www.kff.org/entmedia/entmedia102803pkg.cfm.

[20] Kaiser Family Foundation, *The Media Family: Electronic Media in the Lives of Infants, Toddlers, Preschoolers and Their Parents*, at 20 (May 24, 2006), http://www.kff.org/entmedia/7500.cfm.

[21] Similarly, the U.S. Census Bureau recently released data on child-parent interaction illustrating how the use of household media rules appears to be growing, stating that "Parents are taking a more active role in the lives of their children than they did 10 years ago." Specifically, parents are crafting more TV rules for their children today than they were in the past. The Census Bureau report measured how many families imposed three specific types of household media rules: restrictions on the type of programming allowed, the number of hours watched, and time and day viewing was allowed. It found the percentage of families imposing all three types of rules rose from 1994 to 2004 for the three different age groups surveyed: enforcement in families with children 3 to 5 years of age rose from 54% to 64.7%, 6 to 11 years of age rose from 60.3% to 70.5%, and 12 to 17 years of age rose from 40.2% to 46.7%. U.S. Census Bureau, "Parents More Active in Raising Their Children; More Children Get Television Restrictions" (Oct. 31, 2007), http://www.census.gov/Press-Release/www/releases/archives/children/010850.html.

This research demonstrates that the V-Chip is merely one tool or strategy that households can use to control broadcast television programming in their homes. There is a mosaic of parental control tools and methods families can use—as they see fit and in various combinations—to deal with household media exposure and consumption. With this diversity of tools and methods, families now have the ability to construct and enforce their own "household standard" for acceptable media content in their homes. And this is consistent with what the Second Circuit called "a notional pillar of free speech—namely, choice." Pet. App. at 41a.

Both technological and non-technological user empowerment tools have changed the media landscape such that broadcast can no longer be considered an uncontrollable "intruder" into the home that is easily accessible by children, and thus is deserving of less than maximum First Amendment protection. The core factual assumptions that underlie *Pacifica*'s lower level of First Amendment protection are no longer valid. In their stead, this Court should follow the standard strict scrutiny jurisprudence applicable to content-based regulations of speech.

C. As Modern Communications Technologies Converge, Any Remaining Foundation for *Pacifica* Is Being Eliminated.

In 1978, when *Pacifica* was decided, there really were only two ways to deliver content to the masses: via broadcast (radio and TV) and via paper (newspapers, magazines, etc.). Thirty years later, however, the proliferation of new media technologies is radically transforming how entertainment and news content gets delivered. We are in the midst of a "converged" world where distinctions among various types of content and delivery methods are rapidly blurring. At the same time, parents have a strong and growing ability to take direct control of what media their children access (on television, as discussed *supra* Part I.B., and in new media as briefly discussed *infra* Part I.C.3.). These changes are reshaping how our society can most effectively protect children from inappropriate content.

These dual technological developments raise the question of whether in an age of convergence it is appropriate to apply different legal standards to the same content delivered via different media. *Amici* submit that it is becoming less and less reasonable to call out broadcast as a "unique" medium where otherwise fully protected speech may be censored by the government. With broadcast television being just one of the myriad of ways that people can access lawful content (including indecent content), it no longer makes sense from a constitutional or policy

perspective to give broadcast speech less First Amendment protection.

As the Second Circuit opined below, the "FCC's arguments . . . must be evaluated in the context of today's realities. The proliferation of satellite and cable television channels—not to mention internet-based video outlets—has begun to erode the 'uniqueness' of broadcast media." Pet. App. at 43a. And critically, as First Amendment jurisprudence adjusts to the converged environment, the full constitutional protection afforded in *Reno v. ACLU* (relating to the Internet) is the appropriate analysis to apply to converged media. As discussed *supra* Part I.A., *Pacifica* is no longer valid in the broadcast context, and it should have no relevance whatsoever in the converged environment.

1. New Technologies Are Transforming Society.

The proliferation of new technologies is rapidly changing the media landscape, a fact the FCC tried to downplay by citing this Court's assertion that "[d]espite the growing importance of cable television and alternative technologies, broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." Pet. App. at 106a, quoting *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (internal quotations omitted).

However, more than 10 years have passed since the Court uttered those words. In that time, the media environment has changed profoundly: Americans—adults and children alike—are increasingly accessing new video and audio content on the Internet (*e.g.*, YouTube, Apple iTunes, and podcasts[22]), through cable and satellite operators (*e.g.*, DirecTV, EchoStar's "Dish Network," and XM and Sirius satellite radio), and DVD (*e.g.*, Netflix) and video game purchases and rentals. Almost half of Americans use the Internet, and 87% of U.S. children ages 12 to 17 use the Internet.[23] The Commission itself recognizes that "almost 86% of households with television subscribe to a cable or satellite service." Pet. App. at 106a-107a.

2. New Technologies Are Subsuming Broadcast.

Not only are more people accessing video and audio content by other means, broadcast itself is

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[22] A "podcast" is an audio or video file, usually in MP3 format, made for download to a portable player or personal computer. *See* Definition of "podcast," Urban Dictionary, http://www.urbandictionary.com/define.php?term=podcast.

[23] *See* Mary Madden, *Internet Penetration and Impact*, Pew Internet & American Life Project, at 3-4 (April 2006), http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf; Amanda Lenhart, Mary Madden, Paul Hitlin, *Teens and Technology: Youth Are Leading the Transition to a Fully Wired and Mobile Nation*, Pew Internet & American Life Project, at i (July 27, 2005), http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf.

converging with these new media technologies. Individuals can now access "broadcast" programming via their cable and satellite subscriptions. In addition, network programming is increasingly available on the Internet. For example, entire episodes of popular network shows like "Lost" and "Grey's Anatomy" can be viewed on the networks' websites for free.[24] Indeed, broadcasters are now sometimes posting their content online *prior* to its release on broadcast platforms. For example, in March 2005, NBC debuted its sitcom "The Office" on the Internet a week before the show premiered on network television.[25]

Network shows and other broadcast programming are also available on websites such as iTunes and YouTube. Furthermore, many broadcast programs can be downloaded through video game consoles,[26] and complete seasons of most broadcast shows are available for rental or purchase on DVD shortly after

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[24] *See* ABC.com Full Episode Player, http://dynamic.abc.go.com/streaming/landing; CBS, http://www.cbs.com/video/; NBC, http://www.nbc.com/Video/; and Fox's "Primetime on myspacetv," http://profile.myspace.com/index.cfm?fuseaction=user.viewprofile&friendid=281211598.

[25] Anne Becker, "NBC's *Office* Gets Web Broadcast," *Broadcasting & Cable* (March 16, 2005), http://www.broadcastingcable.com/article/CA511340.html.

[26] Elizabeth Gillespie, "Microsoft to Offer TV Shows, Movies Through Xbox Live," *USA Today* (Nov. 7, 2006), http://www.usatoday.com/tech/products/services/2006-11-07-xbox-download_x.htm.

the TV season comes to a close. Although some Americans do still rely on over-the-air broadcast signals for video programming, that is changing and consumers are increasingly accessing broadcast content via multiple non-broadcast platforms.

To the extent that concerns about "children in the audience" remain a motivation for FCC regulation of broadcast content, it is important to note that it is often children who are *leading* the shift away from broadcast to the variety of new (and largely unregulated) media outlets and technologies such as Internet websites, blogs, social networking services, iPods, MP3 players and other mobile devices, and cable and satellite networks. And, when children do consume broadcast content, it is increasingly through these non-broadcast platforms.[27]

3. *Converging Media Technologies Offer a Myriad of User Empowerment Tools to Control Access to Unwanted Content.*

Not only are new technologies changing the way people access video and audio programming, new (and newly improved) user empowerment tools are allowing individuals to exercise unprecedented freedom of choice and to guard themselves and their

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[27] Amanda Lenhart, Mary Madden, Paul Hitlin, *Teens and Technology: Youth are Leading the Transition to a Fully Wired and Mobile Nation*, Pew Internet & American Life Project, at vi (July 27, 2005), http://www.pewinternet.org/PPF/r/162/report_display.asp.

children against content they deem undesirable in this "converged" world.

In the Internet context—into which video programming is inexorably moving—there is a huge and growing number of technology tools available to parents who want to control what content their children access. Internet Service Providers such as America Online have parental control features,[28] and numerous software filtering and other tools are detailed at websites such as www.GetNetWise.org. Parental controls are also being bundled into the leading operating systems provided by Microsoft and Apple.[29] Falling computer storage costs mean it is easier than ever to archive preferred media content on computer systems—and thus increasingly the personal computer can replace, or supplement, the television.[30]

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[28] AOL Safety and Security Center, http://daol.aol.com/safetycenter/parentalcontrols.

[29] Microsoft's Windows Vista parental controls, http://www.microsoft.com/windows/windows-vista/features/parental-controls.aspx?tabid=1&catid=5; Apple's OS X Leopard parental controls, http://www.apple.com/macosx/features/parentalcontrols.html.

[30] Melissa J. Perenson, "The Hard Drive Turns 50," *PC World* (Sept. 13, 2006), http://www.pcworld.com/article/127104/the_hard_drive_turns_50.html.

4. In the Converged World, All Content Delivery Warrants Full First Amendment Protection.

As the Court considers the APA questions raised in this case, the Court should consider the larger context in which the FCC's efforts to regulate broadcast indecency exist. Whether or not the Court takes this opportunity to declare that *Pacifica* is dead, it is surely dying. The emergence of parental control tools for both broadcast and new media has a direct impact on the legal underpinnings of the FCC's authority to regulate broadcast content.

Although the goal of protecting children is without question a valid goal, the government may only "regulate the content of constitutionally protected speech [*e.g.*, indecency] in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126. In both the cable and Internet contexts, applying strict scrutiny, this Court has squarely endorsed the use of technology as a less restrictive means to further a governmental objective. *See, e.g.*, *Reno*, 521 U.S. at 877 (noting significance of "user based" alternatives to governmental regulation of speech on the Internet); *Playboy*, 529 U.S. at 814-15 (noting the same for cable television). As traditional "broadcast" content moves onto the converged network, technology is making *Pacifica*, with its lower level of First Amendment protection, obsolete.

II. THE FCC'S RELIANCE ON COMPLAINT COUNT AND ITS FLAWED "CONTEMPORARY COMMUNITY STANDARDS" ANALYSIS VIOLATE THE APA AND FIRST AMENDMENT.

Beyond the APA considerations that are the focus of the Second Circuit's holding below, and the concerns about *Pacifica* discussed above, the FCC's actions on review are further flawed because of the blatant manipulation of and reliance on "complaints" to justify Commission action. The FCC's reliance on manipulated complaint figures and its failure to make a proper "community standards" determination violate both the APA and the First Amendment.

A. The FCC Arbitrarily and Capriciously Relied on Manipulated and Inflated Complaint Data as an Impetus to Act.

Relying on past formal and informal statements by the FCC, some *amici* argue that the Commission has a broad public mandate to boost its enforcement of broadcast standards because it has received "hundreds of thousands of complaints alleging that various broadcast television programs . . . are indecent, profane, and/or obscene."[31] This asserted increase in viewer complaints has been the direct impetus for increased FCC action against indecency.

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[31] *See* Brief of *Amicus* Center for Constitutional Jurisprudence, at 4-5, *citing* Jt. App. at 27.

Former FCC Chairman Michael Powell testified before Congress in 2004 that the agency was motivated "to sharpen [its] enforcement blade" because of the "rise in the number of complaints at the Commission."[32] Powell subsequently stated that "the increase in the Commission's enforcement efforts in this area is *a direct response* to the increase of public complaints."[33] In explaining the Omnibus Order on appeal here, current FCC Chairman Kevin Martin pointed first to an asserted dramatic growth in the number of complaints.[34]

The FCC's reliance on an asserted increase in complaints is inappropriate because the Commission itself manipulated the count of complaints in two ways. First, during the summer of 2003, the FCC changed how it counted indecency complaints—and apparently only *indecency* complaints—by counting "identically worded form letters or computer-

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[32] Testimony of Federal Communications Commission Chairman Michael K. Powell Before the House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet, at 2-3 (Feb. 11, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243802A3.pdf.

[33] Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the National Association of Broadcasters Convention, Las Vegas Nevada, at 1 (April 20, 2004) (emphasis added), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246876A1.pdf.

[34] Statement of Chairman Kevin Martin, Jt. App. at 163.

generated electronic complaints" as individual complaints, rather than counting them as a single complaint.[35] The Commission did not make any public announcements about this change in methodology, but a 2003 press release from a pro-regulatory advocacy group claimed credit for getting the FCC to change its methodology.[36] *Amici* fully support citizens' First Amendment right to petition the government for a redress of grievances and so do not take issue, as a matter of principle, with the Commission's counting of form complaints as multiple indecency complaints (so long as the FCC does not single out *indecency* complaints to inflate in this manner, as the FCC did here). The Commission cannot, however, rely on such a change in formula to claim a *true* increase in complaints.

Second, and more egregiously, in early 2004 the FCC began counting individual complaints *multiple times*.[37] Thus, if a single individual addressed a single

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[35] *See* Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress & Freedom Foundation, Progress on Point 12.22, at 5 (Nov. 2005), http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf.

[36] Parents Television Council, "FCC Reacting to PTC Demands," Press Release (July 1, 2003), http://web.archive.org/web/20030802090628/http://www.parentstv.org/ptc/publications/release/2003/0701.asp.

[37] In a 2004 report, the FCC acknowledged that under its new methodology the reported count of complaints may contain "duplicate complaints." Federal Communications Commission,

complaint to seven different offices within the FCC (*e.g.*, Enforcement Bureau, Consumer & Governmental Affairs Bureau, and the five Commissioners), the FCC counted that one complaint as *seven different* complaints, thereby radically inflating the reported number of complaints received. This change in complaint counting only applied to broadcast indecency and obscenity complaints.[38]

Although the appropriateness of the FCC's manipulation of the indecency complaint counts (to the exclusion of the other types of complaints) is not squarely before this Court because it was not addressed below, this Court should be highly skeptical of any assertions by the Petitioners and their *amici* that there is a high level of national outrage about broadcast indecency.[39] To the contrary, as discussed *infra* Part II.B., it appears far more likely that the "community" is much more accepting of indecent content than the FCC would like to admit.

"Quarterly Report on Informal Consumer Inquiries and Complaints Released," First Quarter 2004, 9 n.** (Feb. 11, 2005), http://www.fcc.gov/cgb/quarter/2004qtr1.pdf.

[38] *Id.*

[39] In the related legal challenge to the "fleeting" visual image of Janet Jackson's breast at the Super Bowl, the Third Circuit Court of Appeals noted similar allegations about the FCC's manipulation of complaint counts. *See CBS Corp. v. FCC*, No. 06-3575, at 7 n.2 (3d Cir. July 21, 2008) (noting that record is "unclear on the actual number of complaints received from unorganized, individual viewers").

B. The Commission Failed to Undertake Any Investigation Into "Contemporary Community Standards," and Instead Arbitrarily and Capriciously Relied on Its Manipulated Indecency Complaint Count.

The Commission did not articulate any clear methodology for determining the "contemporary community standards" for "patent offensiveness" by which it judges an indecency complaint. Rather, it simply determined community standards based in part on "constant interaction with . . . public interest groups, and ordinary citizens." Pet. App. at 86a. But, taking what the FCC has said at face value, it appears that the FCC treated its manipulated complaint count as significant: the Commission devoted the bulk of the first paragraph of its Omnibus Order to its assertion that a rise in complaints indicates a greater "unease" on the part of the public over indecency. Jt. App. at 26.

There is no credible evidence, however, to support the conclusion that the American public has shown any increased concerns about indecency on television. To the contrary, the facts discussed *infra* Part II.C. indicate that a single organization generated almost all of the complaints, and that organization urged the FCC to change its complaint counting methodology to radically inflate the number of indecency complaints.

To avoid being "arbitrary and capricious" under the APA, an agency must "articulate a satisfactory

explanation for its action."[40] That explanation must reveal a "rational connection between the facts found and the choice made."[41] The agency must "examine the relevant data" and make an appropriate decision based on that data"—the decision cannot "run[] counter to the evidence before the agency."[42] By relying on manipulated counts of complaints generated almost entirely by a single organization, the Commission failed to live up to these requirements.

Other than apparently relying on inflated complaint data, the Commission wholly failed to conduct an investigation into and analysis of what is "patently offensive" according to "contemporary community standards," as required by the First Amendment. *See Miller v. California,* 413 U.S. 15 (1973). Instead, the Commission simply relied on its own "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens." Pet. App. at 86a. This "collective experience" fails to meet constitutional standards.

The *Miller* Court gave an indication of the type of evidence appropriate to determine "community standards": "an extensive statewide survey" of what

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[40] *Motor Vehicle Mfr. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[41] *Id., citing Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962).

[42] *Id.*

content is *in fact* available in the community. *Miller*, 413 U.S. at 31 n.12. The FCC, however, failed to conduct any investigation into such evidence in this case. The FCC must present some objective and representative evidence of what types of content are available to children in the United States—as opposed to content that is "patently offensive" to the five individual Commissioners themselves.[43]

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[43] The imperative to look to what is actually available in the community to be protected is vital in light of the sometimes unexpected evidence about actual versus publicly expressed preferences about controversial content. For example, in the traditionally conservative Salt Lake City television market, the four most popular shows are "C.S.I.," "C.S.I. Miami," "E.R.," and "Desperate Housewives"—all of which have been designated by the Parents Television Council as among the worst shows on television. The same trend holds in conservative Oklahoma City, where "Desperate Housewives" is more popular than it is in Los Angeles, as well as Kansas City where the show is bigger than it is in New York City. *See* Bill Carter, "Many Who Voted for 'Values' Still Like Their Television Sin," *New York Times* (Nov. 22, 2004) http://www.nytimes.com/2004/11/22/business/media/22tube.html; Frank Rich, "The Great Indecency Hoax," *New York Times*, (Nov. 28, 2004), http://www.nytimes.com/2004/11/28/arts/28rich.html; Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress & Freedom Foundation, Progress on Point 12.22, at 10 (Table 3) (Nov. 2005), http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf. These findings are consistent with the evidence presented in an obscenity trial in the 1990s in Provo, Utah—in that case the defense proved that a range of sexually explicit content was available and

A brief (albeit unscientific) examination of content that already exists in the "community" of media consumers (including minors) in America quickly shows a much more lenient national standard of "patent offensiveness" than the FCC asserts. The "Internet Movie Database," for instance, cites hundreds of examples of the term "bullshit" among "memorable movie quotes." And among these occurrences, the Motion Picture Association of America (MPAA) has given many of the movies featuring this particular expletive a PG or PG-13 rating.[44] Occasional uses of the word "fuck" are also common in movies, including movies rated PG-13 and thus available to children across the country.[45] Setting aside the question of whether these ratings are suitable, the Commission seems to have ignored

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acquired in the local community. *See* Terry Neal, "GOP Corporate Donors Cash in on Smut," *washingtonpost.com* (Dec. 21, 2004), http://www.washingtonpost.com/wp-dyn/articles/A15644-2004Dec21.html.

[44] For example, the IMDb reveals instances of the expletive "bullshit" in *The Abyss* (PG-13), *The Air Up There* (PG), *America's Sweethearts* (PG-13), *Back to the Future II* (PG), *Cocoon* (PG-13), and *Goonies* (PG). *See* The Internet Movie Database, http://www.imdb.com/Find?select=Quotes&for=bullshit.

[45] As indicated in the IMDb, the word "fuck" appears in a broad range of PG-13 movies, including: *Love Affair* ("fuck" spoken by actress Katherine Hepburn), *Gunner Palace* (42 instances of the word "fuck"); *Hero* (11 instances), *The Ringer* (a movie clearly aimed at an under-18 audience). *See* The Internet Movie Database, http://www.imdb.com/Find?select=Quotes&for=fuck.

the fact that words it finds indecent can be found in movies already marketed to and accessible by children in our communities (and widely available in the home over cable and satellite services, and on DVDs).

In the face of this evidence—as one of the Commissioners acknowledged[46]—the FCC cannot rest on an utter lack of inquiry into what content is in fact already available to children in this country. In the absence of inquiry into and evidence of actual community standards, the FCC's indecency rulings violate both the APA and the First Amendment.

C. The FCC's Manipulation of Complaints and Its Failure to Assess the Actual Community Standards Grants a Vocal Minority a "Heckler's Veto."

The Commission's manipulation of the complaint counts, discussed *supra* Part II.A., grossly inflates the seeming expression of concern that (if appropriately counted) the complaints might reflect. But the situation is greatly aggravated because the vast majority of indecency complaints were generated by *a single advocacy group*.[47] In 2003, 99.8% of indecency complaints were submitted by the Parents Television

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[46] *See* Statement of Commissioner Jonathan Adelstein, Jt. App. at 172.

[47] *See* Todd Shields, "Activists Dominate Content Complaints," *Mediaweek* (Dec. 6, 2004), http://web.archive.org/web/20041214162512/http://www.parentstv.org/PTC/news/2004/indecency_mediaweek.htm.

Council (PTC). As of October of 2004 (and excluding complaints related to Janet Jackson's "wardrobe malfunction" during the Super Bowl halftime show), 99.9% of complaints had been submitted by the PTC that year.[48] In July 2005, the PTC submitted 23,542 complaints which "account[ed] for *all but five* of the FCC complaints" for that month.[49] The PTC was responsible for the two complaints remaining at issue in the present case (and at least three of the four complaints originally at issue here).[50]

By failing to conduct the required community standards analysis and instead relying primarily on an inflated count of complaints generated by a single advocacy group, the Commission has enabled a "heckler's veto" in violation of the First Amendment.

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[48] *Id.* Another advocacy group also participated with the PTC in efforts to generate complaints about the 2004 Super Bowl. *See* American Family Association, "File An Official Indecency Complaint With The Federal Communications Commission (FCC) About Jackson's Exposure During Super Bowl Halftime Show!," http://www.afa.net/petitions/fcccomplaint.asp.

[49] *Broadcasting & Cable*, "PTC Drives Spike In Smut Gripes" (Nov. 14, 2005) (emphasis added), http://www.broadcastingcable.com/article/CA6283286.html?display=News&referral=SUPP.

[50] The PTC complained of Cher's statement at the 2002 Billboard Music Awards, Jt. App. at 86 n.150; Nicole Richie's statement at the 2003 Billboard Music Awards, Jt. App. at 91 n.163; and the use of "dick," "dickhead" and "bullshit" by "NYPD Blue" characters, Jt. App. at 98-99; Pet. App. at 129a n.220. The FCC does not reveal who complained of "bullshitter" on "The Early Show." Jt. App. at 105; Pet. App. at 125a-126a.

This Court recognized over half a century ago that the "heckler's veto" is antithetical to the First Amendment, stating that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker." *Feiner v. New York*, 340 U.S. 315, 320 (1951). This Court in *Miller* stated that material "must be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one." 413 U.S. at 33. More recently, this Court struck down the Communications Decency Act, stating that one component of the statute "would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech . . . ." *Reno*, 521 U.S. at 880 (citation omitted).[51]

Although the FCC acknowledges the inappropriateness of allowing a "particularly sensitive group" to suppress lawful expression, Jt. App. at 33 n.13, the Commission has done just that, allowing a single advocacy group to drive its entire indecency enforcement process. By effectively using a single group's views as a substitute for the required community standards analysis, the Commission is impermissibly allowing a vocal minority to stifle speech that is lawful and accepted by a great many

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[51] The First Amendment also shields against tyranny of the majority. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

viewers. Many of the television shows that are the primary targets of the group's mass complaint-generation efforts also happen to be some of the nation's most popular shows, even in the most socially conservative parts of the country.[52] Rather than capitulating to a determined and outspoken minority of viewers, the Commission must itself undertake an investigation into relevant facts that would establish the appropriate "community standards."

The "heckler's veto" analysis does not change in the face of the FCC's argument that the allegedly profane words could have been removed from the three television shows without materially altering them. *See* Pet. App. at 76a n.44, 98a-99a (2003 BMAs), 123a (2002 BMAs); Jt. App. at 103 ("NYPD Blue"). As one noted commentator explained:

> The Court's reluctance to accept the "heckler's veto," and its refusal to permit one group of citizens effectively to "censor" the expression of others because they dislike or are prepared violently to oppose their ideas, seem well-grounded in the central precepts of the first amendment. Thus, "intolerance-based" justifications for restricting expression, like paternalistic justifications, are constitutionally

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[52] Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," Progress & Freedom Foundation, Progress on Point 12.22, at 10 (Table 3), (Nov. 2005), http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf.

> disfavored, *even if the restriction does not substantially prevent the communication of a particular idea, viewpoint, or item of information.*[53]

Thus, even if certain "profane" words could be edited from programming without affecting the purpose or message of a show, a particularly offended minority group should not be able to censor the use of such words.

III. THE INCONSISTENCY OF THE COMMISSION'S ANALYSIS OF NON-LITERAL EXPLETIVES IS ARBITRARY AND CAPRICIOUS UNDER THE APA, AND CREATES A CHILLING EFFECT IN VIOLATION OF THE FIRST AMENDMENT.

Inherent in the concept of "arbitrary and capricious" is the notion that agency decisions cannot be "guided by unpredictable or impulsive behavior,"[54] or be unreasonably inconsistent with past policy. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 981 (2005). The Commission's utterly inconsistent treatment of "non-literal" expletives, however, sets the gold standard for capriciousness.

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[53] Geoffrey Stone, "Content Regulation and the First Amendment," 25 Wm. & Mary L. Rev. 189, 215-16 (1983) (footnote omitted) (emphasis added).

[54] Black's Law Dictionary, Second Pocket Edition (2001) (definition of "capricious").

For example, the Commission in its initial orders declared that words such as "piss" and "ass" do not describe sexual or excretory functions while words such as "shit" and "fuck" are so inherently offensive that it does not matter whether they are intended to describe sexual or excretory functions. The FCC held that the phrases "fire her ass" and "pissed off" were not indecent. Jt. App. at 138. The Commission acknowledged that "ass" "refer[s] to buttocks, which are sexual and excretory organs," and that "piss" "refers to the act of urination," *id.* at 137-38, but concluded that the words were not used literally: the word "ass" was "used in a nonsexual sense to denigrate or insult the speaker or another character" and that the word "piss" was "used as part of a slang expression that means 'angry.'" *Id.* at 138.

Yet the Commission wholly ignored the completely non-sexual and non-literal use of the word "fuck" in Nicole Richie's statement during the 2003 Billboard Music Awards ("It's not so fucking simple"). The FCC asserted that Richie's non-literal use of the word "fucking" for emphasis was not relevant to the indecency analysis. The Commission stated that "any strict dichotomy between [non-literal] 'expletives' and 'descriptions or depictions of sexual or excretory functions' is artificial and does not make sense in light of the fact that an 'expletive's' power to offend often derives from its sexual or excretory meaning." Pet. App. at 82a-83a.

With regard to Cher's completely non-sexual and non-literal use of the word "fuck" at the 2002 Billboard Music Awards ("fuck 'em"), the Commission stated that "it hardly seems debatable that the word's power to insult and offend derives from it sexual meaning." *Id.* at 117a-118a.

And in considering the show "NYPD Blue,"[55] the FCC in its initial order did not find the word "dickhead" indecent because, even though it referenced the male sexual organ, it was not used for its literal meaning; it was simply an "epithet[] intended to denigrate or criticize their subjects." Jt. App. at 101 n.190.

Somehow in that same order the Commission reached exactly the opposite conclusion for "bullshit," stating that regardless of whether the word is "used literally or metaphorically, [it] is a vulgar reference to the product of excretory activity." *Id.* 100. The Commission ignored the fact that the definitions of "dickhead" and "bullshit" are both equally divorced from any sexual or excretory origins: "dickhead" is defined by Merriam-Webster as "usually vulgar: a stupid or contemptible person," and "bullshit" is

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[55] The Commission did subsequently dismiss the complaint against "NYPD Blue," Pet. App. at 131a, but this dismissal is based on a technicality, and the Commission did not in anyway step back from its wholly inconsistent treatment of "dickhead" and "bullshit."

defined as "usually vulgar: nonsense; especially: foolish insolent talk."[56]

As this Court has made clear, agency action is not arbitrary and capricious if "the agency's path may be reasonably discerned." *Motor Vehicle Mfr. Ass'n*, 463 U.S. at 43 (citation omitted). It is impossible to discern, however a clear and understandable distinction showing why "bullshit" is indecent but "dickhead" is not. This internal inconsistency violates the Administrative Procedure Act.

Beyond the APA, the FCC's inconsistency also creates a chilling effect contrary to the First Amendment's guarantee of freedom of speech. If broadcasters cannot predict when the FCC will be forgiving of a non-literal expletive and when it will not, they will be forced to engage in self-censorship to play it safe, thereby foregoing the creation of content that in fact would be legal.[57] This, of course, can hurt the broadcasters and advertisers commercially. More importantly, society as a whole is hurt because it loses access to material that is legitimately entertaining, artistic, educational or newsworthy.

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[56] Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/dickhead, http://www.m-w.com/dictionary/bullshit.

[57] *See Laird v. Tatum*, 408 U.S. 1, 12-13 (1972) ("constitutional violations may arise from the deterrent, or 'chilling' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights").

CONCLUSION

Justice Brennan noted, writing in dissent in *Pacifica*, "there lurks in today's decision a potential for '[reducing] the adult population . . . to [hearing] only what is fit for children,'" and he expressed his uncertainty "that such faith in the Commission is warranted." *Pacifica*, 438 U.S. at 769 (citation omitted). Although the Commission did initially (and for more than two decades) exercise its authority with caution, it is now trying to dramatically expand its regulation of broadcast content by censoring "fleeting expletives" at the same time the very foundation of its regulatory authority is radically contracting. Whether or not Justice Brennan's fears were justified 30 years ago, they are today.

Amici respectfully urge this Court to affirm the judgment below, and hold that *Pacifica* will not be a First Amendment guidepost for the converged network of the 21st century.

Respectfully submitted,

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August 8, 2008

AMICUS CURIAE BRIEF

110 (27) JUNE 308

Case No. 07-582

In the Supreme Court

Of the United States of America

Federal Communications Commission

And United States of America, Petitioners

v.

Fox Television Stations, Inc., Et Al., Respondents

On Writ of Certiorari to the United States

Court Of Appeals for the Second Circuit

Amicus Brief and Motion for Leave to File

Of Decency Enforcement Center for Television

Supporting Petitioners

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Proposed amicus curiae Decency Enforcement Center for Television, by and through its counsel of record, hereby files this Motion requesting leave to file its attached Amicus Brief (with counsel of record listed at the end thereof), and in support of this Motion, states as follows:

1. The nature of Movant's interest is fully set forth in the Interest of the Amicus Curiae section on page 1 of the proposed Amicus Brief, which follows. In the interest of limiting the word count of this document and avoiding duplication, that section of the proposed brief is hereby incorporated by reference herein, as if set forth word for word in this Motion.
2. Movant has received written consent to file the attached brief from the Office of the U.S. Solicitor General, representing both petitioners, Federal Communications Commission, and United States of America. Movant has also received written consent to file the attached brief from all principal respondents in the case, as set forth on this Court's docket of this case, being Fox Television Stations, NBC Universal, and NBC Telemundo, as well as from CBS Broadcasting and intervening respondent Center for Creative Voices, Inc.
3. However, the Petition for Writ of Certiorari lists a few additional parties to this proceeding, which are listed below, and which list is also consistent with the record of the

case from the underlying court, the U.S. Court of Appeals for the Second Circuit.

4. Movant on April 22, 2008, mailed a letter to every party in this case, requesting written consent to file an amicus brief supporting petitioners. All are presumed by law to be received.
5. As of May 26, 2008, the date that this Motion and Brief had to be sent to a printer to publish them in the booklet format required by U.S. Supreme Court Rule 33.1, for filing by the June 9, 2008 deadline, Movant had not received any written response from any of the following respondents or their counsel: NBC Affiliates, Inc.; ABC Television; KTRK Television; WLS Television; ABC Affiliates; FBC Affiliates; or Hearst-Argyle.
6. This Motion is made pursuant to U.S. Supreme Court Rules 21 and 37.
7. Many of the arguments presented in the proposed brief have not been raised by any other party or amicus, and are critical to a full and accurate legal consideration of this case by this Court, especially from the perspective of the legal and practical reality of the potential impact of the Court's decision upon life in this nation for its citizens. That consideration should not be precluded by the withholding of consent from any parties in the case opposite those sought to be supported by the brief, who have themselves consented, along with the principal respondents.

QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communication Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent or profane language", 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

Respondents who were petitioners in the court of appeals below are Fox Television Stations, Inc.; CBS Broadcasting, Inc.; WLS Television, Inc.; KTRK Television, Inc.; KMBC Hearst-Argyle Television, Inc.; and ABC Television, Inc.

Respondents who were intervenors in the court of appeals below are NBC Universal, Inc.; NBC Telemundo License Co.; NBC Television Affiliates; FBC Television Affiliates Association; CBS Television Affiliates; Center for Creative Community, Inc., doing business as Center for Creative Voices in Media; and ABC Television Affiliates Association.

CORPORATE DISCLOSURE STATEMENT

Decency Enforcement Center for Television, a Michigan non-profit, IRC 501 (c) (3) tax exempt, corporation has no parent company, and no publicly held company owns 10% or more of its stock. (Decency Enforcement Center for Television currently is incorporated on a non-stock basis).

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Decency Enforcement Center for Television (hereafter "Decent TV") files this brief supporting petitioners. Decent TV is successor in interest to Thomas B. North, who, while a Probate/Family Judge in Michigan, individually filed an amicus brief in this case in the U.S. Court of Appeals for the Second Circuit, with leave. Thereafter, Decent TV was incorporated for the purpose of legally defending human and civil rights secured by decency laws, especially those for television. Decent TV speaks and advocates from the legal and practical perspective of 1) the over 30 million American citizens who have one or more televisions in their homes, but do not have cable or satellite service, and therefore, do not have any content "blocking technologies" afforded by such services, and 2) those millions of American citizens who do not have a "V-chip", the technology in newer and larger televisions that, if properly programmed, "blocks" broadcast programs out, based on the rating assigned by the broadcaster, if a rating has been assigned.

Decent TV therefore advocates for the tens of millions of Americans who rely solely on the laws and rules of the United States government,

[1] No counsel for any party authored this brief in whole or in part, nor did counsel for any party make any monetary contribution intended to fund the preparation or submission of this brief. U.S. Supreme Court Rule 37.6. Written consent to filing received from Petitioners and principal Respondents Fox and NBC – see Motion for Leave to File.

including the Federal Communications Commission, to protect themselves from indecency in the sanctity of their own homes. Decent TV is further representative of EVERY American citizen in the sense that 1) they must rely on those federal laws to protect themselves and their families from broadcast television indecency in the many everyday public places in which broadcast television is present, but where citizens cannot program a "V-chip", and 2) citizens are constantly within range of one or more broadcast radio stations, for which there is no "V-chip" or other blocking technology in existence, but which are regulated by the same federal statute, the Radio Communication Act (18 U.S.C. sec. 1464) and the rules promulgated thereunder.

American citizens cannot be expected to assume that all necessary legal and factual arguments will be made by the parties to the case or other amici, partly due to the number of issues that may be raised, and word limitations in parties' briefs. Many of this amici's arguments were not raised by any other party or amicus in the Second Circuit. There is a critical right of American citizens to fully protect their own interests by participating in the process of the courts, to ensure that all of their critical, necessary arguments are advanced for consideration. The participation of amicus curiae is recognized in U.S. Supreme Court Rule 37.

SUMMARY OF ARGUMENT

The Court of Appeals did not address the constitutional arguments made by some Respondents (Petitioners in that court) or their amicus concerning Federal Communications Commission (hereafter, the "Commission") change of policy. The Question Presented to this Court by Petitioners is a narrow administrative law question, further narrowed by the facts of the case, two television programs broadcast with unedited, live, spontaneous expletives uttered by third parties before 10 p.m., as opposed to any kind of expletives that might be scripted by one of the Respondent networks. There is NO constitutional question presented to this Court. No cross petition has been filed. Any attempt by any Respondent or amicus to now argue any constitutional question to this court is precluded by this Court's Rules 14 and 24.

In the alternative, since amicus cannot file reply briefs, and this being the only opportunity for amicus to argue, if this Court were to nevertheless contemplate considering any constitutional argument that may be made by any Respondent or its amicus, additional prospective arguments are summarized as follows.

There is no necessity for this Court to consider any constitutional question, for several reasons. First, any argument that the technological advent of the "V-chip" blocking technology for broadcast television, as Congressionally mandated, conflicts with the pre-existing federal statutory indecency restrictions for

that medium, and the rules under that statute, is, at the very most, a legislative issue for Congress to resolve, as the author of both statutes. Such a statutory conflict could not possibly affect the established constitutionality of the indecency statute, or even be an issue for the judiciary. Further, the statutes compliment one another, as intended, and do not conflict.

Second, the fundamental and longstanding principle of judicial restraint precludes any serious consideration of a constitutional issue, when the constitutionality of the federal indecency statute and rules generally have already been established by this Court, and the question presented is a narrow administrative law question on the facts presented.

Next, Respondents have failed to preserve any request for any finding as to the general constitutionality of any federal statute or rule. At most, some Respondents have raised an argument that the Commission's determinations as to the two specific television programs' "fleeting expletives" were a change of policy that may be unconstitutional.

This Court has already permanently established that the existing (and since unchanged) indecency provisions in 18 U.S.C. 1464, and the Commission's rules thereunder are constitutional. The judicially established constitutionality of a federal statute and rules only then changes if there is legislative activity, and is not affected by mere later factual events, such as the advent of technology. Further,

this Honorable Court and its Justices are duty bound by oath, and the fundamental and longstanding principle of "stare decisis" to not deviate from precedent.

The advent of the "V-chip", the only blocking technology pertinent to this case, cannot possibly provide any basis for finding that restrictions contained in 18 U.S.C. 1464, the Radio Communications Act, are unconstitutional. The Act applies primarily to broadcast radio, passed by Congress before the invention of television, and which has apparently since been applied to television by everyone, as a form of radio transmission. However, if this Court were to ever strike down the indecency provisions of that statute based on a network's arguments as to the broadcast television "V-chip", it would necessarily also invalidate the statute in its entirety as to broadcast radio. Yet, there does not exist any "V-chip" or ratings for broadcast radio. The federal statute and rules are the ONLY protections that exist against indecent broadcast radio.

Broadcast television and radio remain as uniquely pervasive and accessible to children as ever, if not more so. The arguments of one or more Respondents and their amicus in the Court of Appeals below, as well as of Respondent NBC in its Reply Brief to the Petition for Certiorari, and comments of the Court of Appeals panel, evidence and are entirely based on a clear lack of any understanding of "pervasiveness" as a basis for this Court's decision in *FCC v Pacifica*

Foundation, 438 U.S. 726 (1978).

The federal broadcast indecency statute and rules remain the least restrictive means of achieving the government's compelling interest in protecting children and unconsenting adults in their own homes and in all public places. There is no legal basis to find otherwise. It has been Congress' intent continuously since 1934 that the indecency restrictions in 18 U.S.C. 1464 be enforced as valid, and the judicial branch is legally bound to continue to defer to Congress.

The "V-chip", as a "means", is not available in the televisions of millions of American citizens, leaving them to rely on 18 U.S.C. 1464 and its rules as their only means of protection against broadcast indecency. In the United States, laws are written to protect all citizens, especially minorities, and not just the majority, such as the 80% or so who choose to subscribe to cable or satellite television, or who choose to purchase a new, large television with "V-chip" technology.

The "V-chip" does not come even remotely close to meeting the "effectiveness" requirement from *Sable v FCC, 492 U.S. 115 (1989).* Some of the reasons are in foregoing arguments, including the continued unique pervasiveness of the broadcast medium, not present in *Sable.* The only way to program a "V-chip" to block a show is by programming into it the "TV rating" assigned to the program by its network. Many programs are not assigned TV ratings, and cannot be blocked by a "V-chip". The record proves

there is at least a 68% error rate in the rating of programs by Respondents. There is circumstantial evidence that this "mis-rating" is deliberate, to avoid the resulting loss of advertiser revenue, from lower rates commanded by programs that have a TV rating that would exclude the younger audiences. This circumvention of the "V-chip" operation and effectiveness is by the same Respondents that would like the judiciary to discard at least some of the FCC rules under an 80 year old still-effective statute, in favor of this dysfunctional and impractical "V-chip." *Sable* requires that technology to be practical for users to be effective. The "V-chip" is not at all.

The two subject television broadcasts are perfect examples of the ineffectiveness of the "V-chip". Both contained expletives that meet objective criteria for a "TV-MA" adults-only rating. Even if the most diligent parent had a "V-chip" and properly programmed it to block "TV-MA" programs, it could not have possibly functioned to block them, because neither was actually rated "TV-MA."

The Court of Appeals erred by voting 2-1 to strike down the determination of the Federal Communications Commission that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language", 18 U.S.C. 1464, when the expletives are not repeated.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL QUESTION PRESENTED TO THE COURT IN THIS CASE, AND ANY ATTEMPT TO PRESENT ARGUMENT ON A CONSTITUTIONAL QUESTION IS PRECLUDED BY THIS COURT'S RULES.

The U.S. Court of Appeals for the Second Circuit correctly refrained "from deciding the various constitutional challenges to the Remand Order raised by the Networks". The Court of Appeals struck down the determination of the Commission, but on an administrative law challenge.

This Court's Rule 14.1 (a) states that it is the Petitioner, in its Petition, that presents the question to be reviewed by the Court. The Commission established the Question Presented to this Court as follows: "Whether the court of appeals erred in striking down the Federal Communication Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language." 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated."

The question is further narrowed by the facts of the case, which are live, spontaneous, unscripted expletives uttered by third parties. This case has nothing to do with expletives scripted into a program

by broadcasters. There is no reason for this case to have any precedential bearing on whether or not scripted expletives continue to be actionable or not.

No Cross-Petition has been filed.

Some Respondent networks filed Reply Briefs in opposition to the Petition for Writ of Certiorari. In particular, the Reply Brief of Respondents NBC Universal and NBC Telemundo, while at page i. presenting the question to be reviewed as an administrative one, and at page 1 stating that this case "involves nothing more than a routine application of administrative law", goes on towards its end to essentially preserve for any remand, a summary of the constitutional arguments it made to the Court of Appeals.

Coupled with a press release reported by Parents Television Council to have been made by Respondent Fox Television upon this Court's grant of certiorari, that Fox is happy to have "the opportunity to argue that the FCC's expanded enforcement of the indecency law is unconstitutional", there is reason to believe that one or more Respondents will attempt to raise a constitutional question in this Court.

Because amicus are not allowed to file reply briefs, any argument of amicus for petitioners can only be presented now, prospectively, without knowing what arguments Respondent networks or their amicus will actually make. Given the interest of this amicus, its arguments are primarily being submitted prospectively in case a constitutional argument is

attempted.

This Court's Rule 14.1 states that, "only the questions set out in the petition, or fairly included therein, will be considered by the Court." Then, this Court's Rule 24.1 (a) provides that briefs "may not raise additional questions or change the substance of the questions already presented" in the petitions or jurisdictional statements.

The Supreme Court "will generally limit its consideration of the case to the questions specifically brought forward by the petition." *General Talking Pictures Corp. v Western Electric Co., 304 U.S. 175;177-178.* This Court's judgment in *Irvine v California, 347 U.S. 128,129* said:

> "We granted certiorari on a petition which tendered four questions. However, petitioner's counsel has now presented two additional questions... Neither of these was mentioned in the petition. We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid settled, frivolous or state law questions."

And, "the fact that a constitutional question was mentioned in argument does not bring the question properly before the Court." *Mazer v Stein, 347 U.S. 201, 206, n.5.* That the only question presented to

this Court is the administrative law question, and no constitutional question is presented, is verified even by reference to this Court's docket of this case. In addition to Respondent NBC, the Reply Brief of Respondent Fox Television to the Petition for Certiorari also states that the question presented is an administrative one.

It cannot be argued that there is any constitutional question "fairly contained within" the Question Presented in the Petition, because the latter question is, as set forth by Petitioners, "Whether the court of appeals erred...." in its decision. Because the Court of Appeals refrained from deciding any constitutional question, it is not possible that there is any constitutional question "fairly contained within" the question of whether the court of appeals erred in its decision.

II. IN THE ALTERNATIVE, IF THERE IS ANY ATTEMPT BY ANY RESPONDENT TO ARGUE A CONSTITUTIONAL QUESTION, AND IF THIS HONORABLE COURT WERE TO CONTEMPLATE CONSIDERING A CONSTITUTIONAL QUESTION, THE FOLLOWING ADDITIONAL ARGUMENTS ARE ADVANCED:

A. THERE IS NO NECESSITY FOR THIS COURT TO ADDRESS OR DECIDE A CONSTITUTIONAL QUESTION.

1. The technological advent of the "V-chip" for broadcast television and the

> Congressional mandate that it be incorporated into some new televisions, compliment, rather than conflict with, the older federal statute and rules containing broadcast indecency restrictions. In the alternative, at the very most, there is a statutory conflict for Congress to resolve, and no judicial or constitutional issue at all.

Since adoption of the broadcast indecency restrictions in federal statutes and rules, there has been a technological advent known as the "V-chip", for broadcast television only. (This case has nothing to do with cable or satellite television, which are not regulated by government in terms of content). Congress enacted legislation that mandates that "V-chip" technology be incorporated into larger televisions sold in the United States in recent years.

The arguments of Respondents in the court below, and Respondent NBC in its Reply Brief to the Petition for Certiorari, include one that there has been a change of policy by the Commission as to "fleeting expletives" that may be unconstitutional, which assertions are entirely based on the advent of the "V-chip" technology, and the "TV ratings" system upon which the "V-chip" operates. Their arguments appear to say that the "V-chip" is an adequate means for parents to block "fleeting expletives", so that any change of Commission policy in that area is unnecessary and unconstitutional.

Congress' intent in enacting "V-chip" legislation was

that it would compliment and supplement the existing indecency statute and rules for broadcast television. Due to outcry from the general public about ever increasing indecency in broadcast television, Congress acted in this way to provide parents and viewers with one MORE tool of protection. In the legislative process, Congress and the then-President clearly and repeatedly stated this intent in public. Contrary to those facts, NBC advanced a claim in the court of appeals that "Congress and the President had concluded that the 'V-chip' would constitute a more effective and less intrusive means of protecting children than direct Commission regulation". (While some of the networks quoted some of the congressional record and president's statements in their court of appeals briefs, close review of those statements and records showed that none of them in fact supported NBC's above claim).

Arguments by Respondent networks to that effect fly in the face of the fact that just in 2006, while this case was in the Second Circuit, Congress overwhelmingly passed legislation increasing about ten-fold the fines for violation of the broadcast indecency laws and rules. Congress has consistently intended that the indecency laws be enforced as valid, and that they were not abrogated by the "V-chip".

It was the intent of not just Congress and the President that the "V-chip" supplement, rather than supplant, the indecency laws - it was the intent of all

Respondent networks as well. At least, that is what Respondent networks reported to the public through their respective news bureaus. Further, the press reported the networks had agreed with Congress that, in exchange for "V-chip" legislation, and a promise by some Congressional leaders of a three year moratorium on any further legislation in the area of broadcast content (which has long since passed), they would never under any circumstances use the "V-chip" or TV ratings to do exactly what they just did in the court of appeals in this case, i.e., argue that the "V-chip" or TV ratings should take the place of any indecency laws or rules. The Parents Television Council adamantly warned that the networks would renege on those promises, and PTC proved to be prophetic. This Court should hold Respondents to their public promises.

In the alternative, even if this Court were to find a conflict of some type between the older indecency statute or rules promulgated under it, and the newer "V-chip" statute, the impact of the latter is, at very most, a legislative issue for Congress to resolve. Respondents can more easily request a Congressional representative to initiate some legislative procedure to resolve any conflict, than to request relief from the courts on a legislative matter.

There is no such issue at all for the judicial branch of government, and certainly not any kind of constitutional crisis that needs to be addressed by the Supreme Court. The indecency provisions of 18 U.S.C. 1464 have already been permanently

established by this Court to be constitutional, as will be argued later. Congress' later adoption of the minor "V-chip" legislation does not create any constitutional issue for the courts to resolve. Any conflict can easily be the subject of some legislative amendment. In fact, if any governmental body (legislative or judicial) were to determine that one or more rules or laws in this field have to be repealed or stricken, the most logical and sensible result would be for Congress to repeal the "V-chip" legislation, given its history of complete failure, which will be argued later.

2. The fundamental and longstanding principle of judicial restraint precludes any serious consideration of any constitutional issues in this case by this Court.

As the Court of Appeals correctly stated, "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v N.W. Indian Cemetary Protective Ass'n., 485 U.S. 439, 445 (1988).* If this Court affirms the Second Circuit, the net effect will be that, because the Second Circuit did not reach any constitutional issues, the law in this area will remain the same as before, except that the Commission will have to accept the remand order of the Second Circuit, and hold proceedings (if it desires to) concerning live, unscripted, fleeting expletives before possibility of further action against

them. It must also be noted that this case has no relevance to other potential types of broadcast indecency apart from expletives, i.e., any form of nudity or other sexual content.

If, however, this Court were to reverse the Second Circuit in this case, the principle of judicial restraint would still compel against considering any constitutional challenges, primarily due to later arguments to be made regarding this Court having already permanently established the constitutionality of the indecency statute and rules The principle of judicial restraint, then, requires self-restraint by the individual Justices of the Court, since there is very little in the way of checks and balances to enforce the principle established by the decisions. ("...the only check upon our own exercise of power is in our own sense of self-restraint." *United States v Butler, 297 U.S. 1, 79 (1936)(Justice Stone's dissenting opinion).* In this case, the principle of "judicial restraint" is an infinitely more powerful reason to refrain from considering or addressing the already permanently established constitutionality of a federal statute of over 70 years and the rules under it, than is the mere factual technological advent of the ineffective "V-chip" any reason for this Court to instead consider any aspect of it.

3. Respondent networks have failed to preserve any request for any finding as to the general constitutionality of any statute or administrative rules, by failing to raise it in the court of appeals.

In this case, no Respondent has ever requested any finding of the court of appeals or this Court as to the general constitutionality of any statute or rule. Their amicus lack legal standing or authority to independently make any such request beyond the requests made by Respondents themselves. The only request that has been raised and preserved by a party at any time on a constitutional basis is the challenge specifically to any change of Commission policy as to "fleeting expletives." If any network attempts to argue for any finding that anything prior to the Remand Order is unconstitutional, it has not been previously raised or preserved, and is out of order.

4. The constitutionality of the indecency restrictions in 18 U.S.C. 1464, permanently established by this Court in *Pacifica*, is not affected by a mere subsequent factual event, such as the technological advent of the "V-chip", and this Honorable Court is duty bound by oath and "stare decisis" to apply the precedent of its decision in *Pacifica*.

The First Amendment of the U.S. Constitution of course provides the "Congress shall make no law...impairing the right to free speech". And, of course, there is a long litany of federal court decisions, that are not in issue, in which this Court and lower courts have found that a limited right of government to place reasonable regulations upon

speech is consistent with the First Amendment. To the extent that 18 U.S.C. 1464 and the Commission's rules have been found constitutional by this Court and every lower court that has addressed them, this established constitutionality does not change unless there is some change at the legislative level. The U.S. Constitution does not change, unless it is in accordance with its own provisions for amendment, which require legislative action. The judicial branch has no power to amend it, only to interpret it. The statute itself has not been amended by Congress since 1934. The Commission's rules may have changed at some point, but not at any time germain to this case, except possibly in the subject Remand Order as to "fleeting expletives."

No mere later factual event, such as the technological advent of the "V-chip" in this case, changes the Constitution, or by the same token, the established constitutionality of a statute or rule. In the United States, in our form of government, we apply the law to the facts to reach a legal result; we do not apply the facts to change the law. To now do the latter would turn American jurisprudence completely upside down, in contravention of the Constitution, which is the ultimate legal authority. The law is not a servant to the facts.

This case does not provide an opportunity for anyone to do anything outside of a strict application of this Court's decision in *FCC v Pacifica Foundation, 438 U.S. 726 (1978)*. This Court is bound by its oaths, and the fundamental and longstanding principle of

"stare decisis" to uphold and apply the law, including the still effective *Pacifica* precedent. There is no legal authority or any other reason to deviate from *Pacifica*.

In the alternative, if this Court were to deviate from *Pacifica* in any way, all of the laws and facts as to the whole issue of broadcast indecency compel the following. The Court should continue to find 18 U.S.C. 1464 constitutional, as it did in *Pacifica*, but find that the "time channeling" (also known as "safe harbor") aspects of its decision, allowing indecent broadcasts at night, were wrongly decided as contrary to 18 U.S.C. 1464. The current Commission rules permitting indecent, non-obscene broadcasts after 10 p.m. resulted from the *Pacifica* decision. But this Court, from a reading of its opinion in *Pacifica*, did not decide or come up with "time channeling" on its own – it was argued by the Commission. The Court was proper in not going beyond the relief requested by the Commission in that case, as the entity "prosecuting" the case as petitioner. But the Commission had no legal authority to advance the "time channeling" concept in the first place, and in doing so, illegally deviated from its Congressional mandate to enforce and uphold 18 U.S.C. 1464 as written. The statute does not in any way hint at "time channeling", and prohibits indecent broadcasts at any time. Therefore, the whole history of "time channeling" of indecent broadcasts is a chain of illegal events. If anything, this Court should only deviate from *Pacifica* to recognize and remedy this "parade of horribles" that has caused an irreparable

and almost incomprehensible downslide and deterioration of American society and culture emanating from indecent broadcasting. The Court can do the thing that is legal and right in every way by finding that 18 U.S.C. 1464 is constitutional on a 24/7 basis, unless it chooses to take the more restrained approach of strictly following *Pacifica* for now.

B. THE ADVENT OF TECHNOLOGIES FOR BROADCAST TELEVISION (THE "V-CHIP" AND RATINGS) CANNOT POSSIBLY PROVIDE ANY BASIS FOR A FINDING THAT INDECENCY RESTRICTIONS IN THE "RADIO COMMUNICATIONS ACT" ARE UNCONSTITUTIONAL, ESPECIALLY WHEN THERE DO NOT EXIST ANY BLOCKING TECHNOLOGY OR RATINGS FOR RADIO.

The statute involved, 18 U.S.C. 1464, is part of the "Radio Communications Act of 1934". It has apparently been interpreted to apply to broadcast television, as a form of radio transmission, by everyone, since the subsequent invention and usage of television. However, the statute is primarily addressed to radio, certainly including standard broadcast radio stations. There is no claim that there exists for broadcast radio any "V-chip", similar or other blocking technology, or ratings system. Therefore, the advent of those technologies for broadcast television cannot possibly be a basis for

this Court to find unconstitutional the "Radio Communications Act of 1934", any rules or regulations promulgated under it by the Commission that also apply to broadcast radio, or even any change of policy as to "fleeting expletives" if that policy also applies to radio. This argument alone is enough to invalidate any constitutional challenges by Respondents or their amicus, except for one to change of policy by the Commission that expressly only pertains to broadcast television, and not radio.

Pacifica, supra, was a radio case, not a television case, so the argument of Respondent NBC in the lower court that "the underpinnings of *Pacifica* have been undermined" (by the television "V-chip" or ratings) is preposterous. NBC has never explained how a "V-chip" or ratings for television undermine the underpinnings of a U.S. Supreme Court case about radio, which has no broadcast blocking technology or ratings.

If this Court were to find 18 U.S.C. 1464 (or any rules under it that apply to radio) unconstitutional, the net result would necessarily and unavoidably be that the entire citizenry of the United States would be left without laws, rules, blocking technology, ratings, or anything else for protection against any level of indecent radio broadcasts at any time of day - a completely chaotic, "anything goes" "free for all", without any level of accountability or responsibility from or to anyone.

C. BROADCAST TELEVISION AND RADIO REMAIN UNIQUELY PERVASIVE AND ACCESSIBLE TO CHILDREN. RESPONDENTS' ARGUMENTS TO THE CONTRARY IN THE COURT BELOW AND REPLIES TO THE PETITION FOR CERTIORARI, AS WELL AS COMMENTS OF THE COURT OF APPEALS PANEL, EVIDENCE THAT THEY ARE BASED ON A COMPLETE LACK UNDERSTANDING OF "PERVASIVENESS" AS A BASIS OF THE "*PACIFICA*" DECISION.

This Court determined in *FCC v Pacifica Foundation, 438 U.S. 726 (1978)* that it is the law of the United States that broadcast radio has unique pervasiveness and accessibility to children. No one has claimed that broadcast television is any different than radio in terms of pervasiveness or accessibility, although that may have been true through about the 1950's as television usage increased. Those findings of this Court are the last word, and are permanent.

Respondent networks in the court of appeals made numerous arguments that broadcasting is less pervasive now than in 1978 when *Pacifica* was decided. NBC in its Reply Brief to the Petition says that *Pacifica* "rests on a moth-eaten foundation". NBC then immediately went into a discussion of cable and satellite television, the Internet, and other sources of media like cell phones, to try to illustrate

their point.

The Court of Appeals, while properly refraining from addressing the constitutional challenge, apparently could not refrain from the temptation to editorialize, and then proceeded to nevertheless comment on that challenge, unfavorably to the Commission. In doing so, the Court of Appeals' majority comprised of two New York judges somewhat seemed to buy into the above arguments.

What the foregoing arguments of Respondents and comments of the two Court of Appeals judges have in common is that they all evidence that they are based on a complete lack of any understanding of the "pervasiveness" leg of the *Pacifica* decision. They all read the "pervasiveness" language in *Pacifica* to mean that in 1978, broadcast radio (and broadcast television) were the only ways that people could access indecency, at least electronically. They treat "pervasiveness" as the level of exclusivity of one medium in comparison to other mediums. Therefore, they argue on the assumption that, as other television mediums develop, i.e., cable and satellite, and as all other mediums develop· whether they be the Internet, new types of telephones, or anything else that might compete for a radio listener or television viewer's time · broadcast television and radio become less pervasive in comparison.

But, alas, that is not what "pervasiveness" means at all, and it is certainly not how this Court was using

the term as a basis for its decision in *Pacifica, supra*. This is clear from a mere reading of the opinion.

"Pervasiveness" in general when applied to a media issue, and when used by this Court in *Pacifica, supra*, instead has everything to do with the nature of the individual medium, standing alone and without regard to any other medium or source. Regardless of the development of cable and satellite television and radio, the Internet, or anything else, broadcast television and radio are still THE television and radio sources that go out into not only EVERY home in America (regardless of whether there is a television or radio present there at a given moment to receive it), but also into EVERY other place in America – every building and every outdoor place, too. Within every building, it also goes into EVERY room. That fact has not changed since 1978, or since the advent of broadcast television, and never will. This is also without regard to whether any other medium is present in that same place. Cable and satellite television and radio, the Internet, and other sources of media, to the contrary, only go where they are invited, usually by subscription. Broadcasting is also unique in that it is free (there is no paid subscription) and requires nothing to install it. A portable battery powered television, for example, receives broadcasts anywhere within range of a station. Respondents ignore all of this. The Commission's Remand Order succinctly states a reasoned basis for treating broadcast television different than "all other speakers."

Respondents would like to make the law ignore the differences between broadcasting and other mediums like cable/satellite, so that they could use indecency to try to compete with those other completely different industries, and anything else that detracts viewers/listeners, i.e., movie theaters, stage plays, etc. But those mediums are completely different. They do not go into every home and place like broadcasting. NBC, for example, owns a number of cable television networks, and that is the only correct forum for them to use to compete with other cable networks, in the same industry, NOT through their broadcast network. NBC, and to some degree other Respondents in this case, are trying to make indecency pervasive in the homes of ALL Americans - forcing it not just upon those who have chosen it, but also upon all who have not chosen it. This includes the over 30 million Americans from the case record who do not have cable or satellite television, and the over 90 million Americans who only have basic cable. In its Reply Brief to the Petition, on page 31, NBC sets forth an unbelievable number of absurd, quantum leaps in just one paragraph. The statements in that paragraph are ludicrous, obviously intended to, in combination, lead to NBC's perception of "nirvana", a nation devoid of any government regulation of its taxpayer owned public airwaves, so that NBC and other broadcasters can achieve their agenda of broadcasting virtually any level of hard or soft core pornography and indecency at any time into every home and place without any restraint. (The obscenity provisions of 18 U.S.C. 1464, which are not challenged, have been rendered

worthless previously by a series of court cases, the net effect of which is that it applies to virtually nothing, given that even "XXX" rated movies like "Deep Throat" have been adjudicated by courts as not obscene).

NBC states that "Thus, there no longer exists any sound basis for according broadcast speech less than obtains in other channels of communications." To the contrary, the basis remains the same, for all of the foregoing reasons. NBC also conveniently ignores the fact that they are using the public airwaves, which is not true for non-broadcast communications.

NBC has been the most aggressive Respondent party (and petitioner in the court of appeals) in arguing for the Commission's policy on fleeting expletives to be stricken, relying on the "V-chip" and ratings, but it is at the same time the network that has been the biggest obstacle to those systems, by having refused to ever fully participate in the TV ratings system by using "content descriptors." In fact, Respondent NBC's legal arguments have often sounded more like tantrums, i.e.."But I don't WANT to play by any rules." There has also been a consistent tone among most of the Respondents' that the Commission is the some kind of "bad guy" on this issue, when in fact, the Commission has been the ONLY principal party in this case that has been complying with the laws and rules adopted by Congress and the federal courts as to the indecency issue, consistent with the First Amendment. Not to mention, the Commission is the only party who pays any attention to the

general public's legal complaints.

Respondent networks seek to not possibly have to answer to anyone, government or viewers, for their currently illegal acts, such as broadcasting indecent expletives before the 10 p.m. safe harbor in this case, and their irresponsible circumvention of the "V-chip" legislation they now rely on, by deliberately mis-rating television programs almost 70% of the time.

In this case involving live broadcasts, Respondent networks rely on the "V-chip" in their arguments, which is proven to not work, while at the same time refusing to be responsible for consistently implementing for live broadcasts a technology that is much more effective, the five second delay. All of the Respondents' arguments are fraught with a "one way street" mentality that leads a reasonable person to believe that they really do not want anything to be implemented, put in place, or to be effective, that might in any way restrict, block or sanction any of their broadcasts, no matter what the content, and thereby interfere with any of their agendas, whether based on forcing unwanted indecency upon people, financial profits, etc.

D. THE INDECENCY STATUTE AND COMMISSION'S RULES REMAIN THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S COMPELLING INTEREST OF HELPING CITIZENS PROTECT THEMSELVES AND THEIR CHILDREN FROM BROADCAST INDECENCY IN THEIR HOMES AND

ALL PUBLIC PLACES.

1. There is no legal basis upon which to find that the indecency laws and regulations are no longer the least restrictive means.

FCC v Pacifica Foundation, 438 U.S. 726 (1978) and the cases on the issue in the lower federal courts have established that a "least restrictive means" analysis applies in broadcast media cases. Some Respondent networks allude to an argument that the analysis should be changed to a "strict scrutiny" analysis. But they have cited no legal authority for the proposition that once the courts have established the analysis to be used for a particular form of speech, the analysis is anything less than permanent and can be changed, even by this Court, much less that the same should occur not based on any legal reason, but due only to some fact, such as a mere technological advent.

Respondent NBC, in its Reply Brief to the Petition, has also made a statement that, "Indeed, in light of post-*Pacifica* technologies – such as ratings systems and the V-chip – that are capable of withholding indecent material "from the young without restricting the expression at its source", 438 U.S. at 748-49, parents have the ultimate authority over whether programming is "accessible" to children at all." citing *United States v. Playboy Entertainment Co., 529 U.S. 803, 816, 826-27 (2000)*. This is one of

the quantum leaps that defies logic. It is the law that parents, broadcasters, and the government each have a role in this nation in assisting one another in protecting children from indecency. In recent years, however, the networks have actively tried to shirk any role or responsibility on their part, and have further fought the government's role tooth and nail, trying to leave parents out there alone. As any of the even most diligent and responsible parents can tell you, it is impossible for them to singlehandedly protect their children without the help of the U.S. government. Any number of scenarios bear this out – single parents, working parents, neglectful parents (whose children have as much right to be protected by government as the children of diligent parents), any parent who allows their child to leave their home to go anywhere (like a friend's home) before they become an adult, etc. It bears reminding that in the U.S., every single person under 18 years of age is a child, by unanimous legal definition. Parents have very little control over the accessibility of their children to broadcasting, especially outside the home, and especially as their children get more mobile.

Ratings and V-chips do not "withhold indecent material". There is no TV rating for all "indecent material", or any V-chip that can be programmed to block all indecency. Again, the ratings and V-chip are based only on the ratings criteria, usually erroneously assigned by the networks (a fact they have never even bothered to publicly challenge in response to all of the many studies proving at least a

68% error rate, until very, very belatedly doing so years later in the court of appeals in this case).

Some Respondents cited *Playboy, supra* in the lower court for the proposition that the least restrictive means does not have to be 100% perfect. That is a misapplication of the principles of that case, which further is completely distinguishable from this case. In *Playboy*, there were faulty cable TV blocking mechanisms that allowed some video and/or audio "signal bleed" of Playboy Channel in a small percentage of homes of cable subscribers that had not subscribed to the Playboy Channel. First, that was a cable television case, so pertinent to this analysis is the fact that only homes as to which the occupants had subscribed to cable had any chance of that problem to begin with. So there was an initial buffer that is not present with broadcast television. But also, there is a big difference between a small percentage of homes with a partial signal bleed that is correctable with a free call to the cable company (from the court record of that case), and a 68% established error rate, found by the Commission in this case, in the ratings upon which the broadcast V-chip entirely depends, which results in a fully clear signal of unblocked indecency, and as to which Respondents do not send to the home a technician to correct it.

In *Playboy, supra*, the court found that blocking technology was only a basis for finding a "less restrictive means" that rendered the law unconstitutional expressly because, by statute, THE

TECHNOLOGY HAD TO BE INSTALLED FREE OF CHARGE TO THE SUBSCRIBER WITHIN TWENTY FOUR HOURS AFTER A FREE TELEPHONE CALL TO THE PROVIDER. So, to really apply *Playboy* to this case, the V-chip could only possibly legally be a "least restrictive means" if the Respondent networks actually installed, free of charge, a "V-chip" set top box within twenty four hours after a free telephone call to that network from any citizen requesting one, anywhere. Even then, the technology itself is not as effective as that in *Playboy*.

Television viewers do not have any burden or responsibility to provide for themselves the cost of the technology i.e., the V-chip, to AVOID indecency. To say otherwise would not only be contrary to the court decisions above, but also perverted and backwards. In the United States, in public places and private homes, decency is the norm, with adult persons free to seek indecency out in private if they choose. Decency can never be allowed to become the exception, rather than the norm.

> 2. This Court's finding in *Pacifica, supra*, as to the unique pervasiveness of the broadcast airwaves was based on not only its accessibility in the home, but also in all public places, where viewers cannot program a "V-chip."

As sacred as homes are, as found by this Court in *Pacifica, supra*, the public airwaves go into many other places, like schools (for all school ages), day

care centers, nursing homes, restaurants, lodging places of all kinds, stores (including department and electronics stores where banks of televisions are on for all shoppers to see), etc. Respondent networks have failed to say how all people that come and go from those types of places are to use a "V-chip" to protect their children and themselves from indecency via broadcasts. It cannot be sanely argued that any private citizen or their child has to be subjected to even a slight risk of so much as brief glimpsing or encountering indecency in the general public just by daring to leave their home and go about their daily affairs. (This is as opposed to other indoor places like movie theaters that may be open to the general public to enter to expressly view indecency). Nor, with all due respect, does any government entity, including the judiciary, have any authority to decide for private citizens that they must take that risk. In fact, this Court has not done that, but has done the exact contrary, by establishing as law that citizens are NOT subject to absorbing a "first blow" of indecency before they can turn away. *Pacifica, supra*. The public airwaves, by settled law, belong to the citizens, not the broadcasters, and are NO different than a public street, sidewalk, park, etc. The broadcast media are therefore different than all other forms, which are by private wire or satellite signal, i.e., cable, satellite, Internet, etc.

3. The "V-chip" is a means that is not available in the homes of millions of American citizens.

Many televisions pre-date the "V-chip", yet work fine for their intended purpose, and will still work after February, 2009, with a digital converter (which, by the way, does not contain a "V-chip"). There will be older televisions in use for decades to come. The Court needs to look at this case from the perspective of the individual families that do not have the blocking technology, no matter what a minor percentage of the population they may become. In this nation, we write laws to protect minorities. Many Americans deliberately do not have cable or satellite television for the express purpose of minimizing the television indecency that may permeate their homes.

The "V-chip" legislation that the networks rely on expressly does not apply at all to televisions with a screen smaller than 13 inches. In the lower court, Respondents quoted statistics of the number of televisions sold since the "V-chip" legislation went into effect, but not the number of those that have smaller screens, and therefore no "V-chip". And, it is reasonable for the courts to take judicial notice that, generally, most smaller televisions end up in childrens' bedrooms, where the "V-chip" would be most needed, if it actually worked.

Respondents also have made much of a statistic that over 80% of American homes have cable or satellite television. But there is no evidence that all cable or satellite systems, especially the older analog systems among them, have blocking technology. And, most satellite television users are either unable or choose

not to receive Respondent broadcast networks via satellite, either because they are not available based on geography, or there is an extra fee. So, those satellite television customers among the 80% still receive any broadcast networks over a regular antenna, and that number is not in the record. Their only blocking technology would still be the "V-chip", if they have it.

E. THE V-CHIP DOES NOT COME EVEN REMOTELY CLOSE TO MEETING THE REQUIREMENT OF "EFFECTIVENESS" IN *SABLE*.

Respondent networks have cited *Sable v FCC, 492 U.S. 115 (1989)* to try to support some of their arguments about blocking technologies. That case required that a blocking technology be "effective" in order to be a means of achieving a compelling government interest. The "V-chip", and ratings on which it relies, do not come anywhere even remotely close to being effective, and *Sable* therefore has NO application to this case. That is partly because of some of the foregoing arguments, including that some programs are not rated, and the rest are mis-rated at least 68% of the time, in order to achieve the great financial incentive of not losing ad revenue by rating for a smaller audience. A .320 batting average is great for a baseball player, but pathetic for the rating of programs, especially when there are clear, objective criteria. Further, when programs are mis-rated, it is almost always in the direction of being rated as suitable for younger viewers than the clear,

written objective criteria dictate, sometimes off by TWO ratings (i.e., TV-MA programs being rated TV-PG). Also, only a very small percentage of V-chips sold are ever actually used, according to the record.

The "V-chip" not only is ineffective, it does not significantly work at all, and is an abject failure. There is no oversight or accountability system as to accuracy of the ratings. The Respondents seek to be the SOLE arbiters of what citizens are subjected to seeing and hearing without any escape. Indeed, it is the broadcast indecency statute and Commission's rules THAT ARE PROTECTING PEOPLE FROM RESPONDENT NETWORKS. Not only are the networks seeking to be the proverbial "foxes guarding the henhouse", but they also do not want to have to answer to anyone later (e.g., the Commission), when they slaughter all the hens.

Respondent networks have not cited any study showing less than a 68% error rate in their ratings assignment. It is not enough to meet *Sable* for anyone to just throw up their hands and say, "Oh well, we tried to help parents. There is some technology out there." Where is the evidence to support the claim of real "effectiveness" akin to *Sable, supra*? The Commission, on remand in this case in 2006, had a 60 day public comment period during which Respondents could have made a record, if they had evidence to do it.

F. THE TWO TELEVISION SHOWS THAT ARE THE SUBJECT OF

THIS CASE PROVIDE A PERFECT EXAMPLE OF THE INEFFECTIVENESS OF THE V-CHIP IN BLOCKING INDECENCY OR ANY CONTENT, AND WHY.

The subject two television programs, even if found not to be legally indecent, provide a perfect example of the ineffectiveness of the "V-chip" and ratings, and WHY the "V-chip" is ineffective.

Respondents would have what they call the current "indecency regime", at least what they argue is a new Commission policy on "fleeting expletives", found unconstitutional. They would replace it with a new regime, the V-chip/ratings, which is exclusively within their control, with no accountability or oversight by anyone.

The Commission, in the Remand Order, has done an excellent job of pointing out that, even if the most diligent parent did everything that Respondents have suggested a parent can do to "ultimately control" what their child sees, the "V-chip" could still not possibly have worked to block either of the two subject programs. Both were rated by the network as TV-PG. Yet, both contained expletives that are rated TV-MA by the objective criteria. A parent who programmed a "V-chip" to block all TV-MA expletives could not have possibly have been successful in doing so, because of the actual TV-PG rating circumventing the "V-chip."

The networks probably did not know that third

parties would utter such TV-MA expletives when they rated the two programs TV-PG. It does not matter. The point is that the two programs illustrate why the V-chip is ineffective.

III. THE COURT OF APPEALS ERRED IN STRIKING DOWN THE COMMISSION'S DETERMINATION ON THE BASIS THAT IT DID NOT SHOW A REASONABLE CAUSE FOR A CHANGE OF POLICY AS TO "FLEETING EXPLETIVES."

As stated earlier in this brief, the primary and express purpose of this amicus is to advocate for the constitutionality of 18 U.S.C. 1464, and the Commission's rules. Any in depth argument as to the administrative law, including those relied upon by the Court of Appeals, is beyond the role of this amicus, and is left principally to the parties and some of the other amicus to develop for the court.

However, it is observed that 18 U.S.C. 1464 does not make any exception from its prohibition on indecent broadcasts for "fleeting", non-repetitive, or live utterances, nor has any such prohibition ever been found unconstitutional by a court. Therefore, there should have always been deference to Congress by the courts and Commission to include those within the statutory prohibitions. That the Commission, when it was comprised differently than now, did not defer to Congress, and gave a pass to broadcasters for "fleeting expletives", was an illegal error that needed correction to comport with law. Taking an

erroneous position does not forever bind an agency to that policy. Correction of error must be preferable to perpetuating it.

The Commission's legal duty and mandate to have in place rules and policies consistent with the statutes adopted by Congress is, at any time, in and of itself, sufficient and more than reasonable cause to amend those rules and policies to comport with the law, without having to establish more of a record. This amicus supports the arguments of Petitioners that the Court of Appeals erred.

CONCLUSION

Wherefore, the judgment of the U.S. Court of Appeals for the Second Circuit should be reversed, and judgment directed in favor of Petitioners, affirming its determination.

Respectfully submitted.

Thomas B. North

Counsel for

Decency Enforcement Center for Television

May 26, 2008

AMICUS CURIAE BRIEF

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No. 07-582

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
v.
FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* FREE PRESS, CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, NEW AMERICA FOUNDATION, PARTICIPATORY CULTURE FOUNDATION, CUWIN FOUNDATION, ETHOS GROUP, ACORN ACTIVE MEDIA FOUNDATION, FREENETWORKS.ORG, MONROE PRICE, SUSAN CRAWFORD IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI*

Amici include consumer groups, think tanks, nonprofit organizations working with community wireless Internet networks, and First Amendment and media scholars.[1]

This Court's decision could have broad implications for rules fostering a more diverse, democratic media, as well as for government flexibility in implementing 21st Century spectrum policy. The *amici*'s interest is to ensure government policy can act to further more robust democratic participation through wireless and wired media.

Free Press is a national, nonpartisan, nonprofit organization using education, organizing, and advocacy to increase informed public participation in crucial media policy debates.

Consumer Federation of America is an advocacy, research, educational, and service organization working to advance pro-consumer policy on a variety of issues before government institutions.

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[1] Pursuant to Rule 37.2 of the Rules of this Court, letters of consent to the filing of this brief have been submitted to the Court. Pursuant to Rule 37.6 of the Rules of this Court, counsel for the *amici* state that no counsel for either party to this matter authored the brief in whole or in part. Further, no persons or entities, other than the *amici* and their counsel, contributed monetarily to the preparation or submission of this brief.

Consumers Union, publisher of Consumer Reports, is an independent, nonprofit testing and information organization serving only consumers

The New America Foundation is a think tank whose purpose is to bring exceptionally promising new voices and new ideas to the fore of our nation's public discourse. One of its major projects is the Wireless Future Program.

The Participatory Culture Foundation is a nonprofit whose core project is Miro, a free open-source software for online television and video designed to make mass media more open and accessible for everyone.

The CUWiN Foundation develops decentralized, open source, community-owned networks that foster democratic cultures and local content.

The Ethos Group is a telecommunications consulting firm focusing on the community benefits of wireless technology.

The Acorn Active Media Foundation engages in software, website, and technical development in support of the global justice movement.

FreeNetworks.org is a voluntary cooperative dedicated to collaboration and advocacy of free networks, particularly wireless networks.

Monroe Price, now a professor at the University of Pennsylvania's Annenberg School for Communication, was dean of Cardozo School of Law from 1982 to 1991. He is the author of several books on free speech and new-media

policy and clerked for Associate Justice Potter Stewart.

Susan Crawford is a Visiting Professor at Yale Law School and will join the faculty of the University of Michigan Law School in the fall. She teaches and writes in communications, First Amendment and Internet law.

SUMMARY OF ARGUMENT

Amici urge the Court neither to question nor to rely on the precedent of *Red Lion Broadcasting Co. v. FCC*[2] or other cases resting on the "scarcity rationale"[3] because *Red Lion* and the other cases are irrelevant to indecency regulation, which is at issue in this case.

In *Red Lion*, this Court unanimously held that the judiciary should defer to attempts by Congress and the Federal Communications Commission ("FCC") to structure access to spectrum where government's intent and effect is to promote the widest possible dissemination of information from diverse and antagonistic sources under the First Amendment.[4] Although

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[2] 395 U.S. 367 (1969).

[3] *See, e.g.*, NBC v. United States, 319 U.S. 190 (1943); FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474 (1940); NBC v. United States, 319 U.S. 190, 213 (1943).

[4] Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) ("*Turner I*") ("[I]t has long been a basic tenet of national communications policy that the widest

(footnote continued...)

the holding in *Red Lion* pertained to two rules that are now long-repealed, the principles of *Red Lion* have been repeatedly reaffirmed by this Court and lower courts.[5] *Red Lion*'s standard of scrutiny has been described by this Court as a "less rigorous standard of First Amendment scrutiny,"[6] and, by several circuit courts, as "rational basis."[7] This Court has upheld laws or regulations that are "a reasonable means" of "promoting the public interest in diversified mass communications."[8] Interpreting Supreme Court precedent, the D.C. Circuit has stated simply that "[b]roadcasting regulations that affect speech have been upheld when they further [the] First Amendment goal" of promoting "the widest possible dissemination of information from diverse and antagonistic

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dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.") (citations and internal quotations omitted). *See also* U.S. Const. Amend. I.

[5] *See, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997) ("*Turner II*") (Breyer, J., concurring). Time Warner Entm't Co., L.P. v. FCC, 93 F.3d 957, 975 (D.C. Cir. 1996) ("*Time Warner I*").

[6] *See Turner I*, 512 U.S. 622, 637 (1994).

[7] *See, e.g.*, Prometheus Radio Project v. FCC, 373 F.3d 372, 401-02 (3d Cir. 2004); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 167 (D.C. Cir. 2002); Fox TV Stations v. FCC, 280 F.3d 1027, 1046 (D.C. Cir. 2002).

[8] *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 802 (1978) ("*NCCB*").

sources is essential to the welfare of the public."[9]

The precedent for broadcast indecency is not *Red Lion* but *FCC v. Pacifica*.[10] In *Pacifica*, a divided Court upheld an FCC fine for a radio broadcast of "Filthy Words." In doing so, the Court refused to rely on *Red Lion* or spectrum scarcity for its holding. Indeed, *Red Lion* has never been a basis for indecency regulation.

Red Lion is a red herring in this case, though both sides have incentives to raise *Red Lion* here. Defenders of indecency regulations, such as the Petitioners, can attempt to stand on the strong and consistent ground of *Red Lion*, seeking firmer footing to defend indecency regulations. Opponents of *Red Lion*, such as Respondents in this case, argue in almost every case and proceeding that *Red Lion* should be overruled. But the Respondents cannot bury *Red Lion* under the weight of *Pacifica* or any other indecency regulation. *Red Lion* has nothing to do with indecency regulation, whether in the broadcasting medium or any other medium. Therefore, the Court should not rely on *Red Lion* to uphold the FCC's challenged policy, nor reach out to question *Red Lion* in striking down that indecency policy.

Even if the Supreme Court reaches the constitutional issues in this case and questions

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[9] *Time Warner I*, 93 F.3d at 975.

[10] FCC v. Pacifica Found., 438 U.S. 726 (1978).

Pacifica, it need not question *Red Lion*. Rather, the Court can merely distinguish *Red Lion*, as it would distinguish any irrelevant case cited by the parties. Questioning *Red Lion*, even in dicta, could upset all broadcast ownership limits, broadcast must-carry rights, spectrum build-out provisions, political content obligations, and the wide range of spectrum policy decisions. It could also require the FCC either to justify every existing spectrum license under strict scrutiny, or to justify any change to existing licenses under intermediate scrutiny. Either result would throw media, Internet, and spectrum policy into chaos—though *Red Lion* is not even at issue in this case. The sounder course is to neither rely on nor under mine *Red Lion*.

ARGUMENT

Amici urge the Court to limit any constitutional analysis to considering *Pacifica*, and not to question the continuing vitality of *Red Lion*'s precedent. Despite the FCC's arguments below, *Red Lion* and its underlying rationales are irrelevant to this case. While the Court may reconsider *Pacifica* in this case, such reconsideration would have at best a minimal impact on rarely enforced rules for a few traditional media outlets. Meanwhile, questioning *Red Lion* could undermine current and forward-looking laws, and cast doubt on every spectrum license.

I. DESPITE THE FCC'S ARGUMENTS BELOW, BOTH *RED LION* AND SCARCITY ARE IRRELEVANT TO THIS CASE

Parties in this case have wrongly suggested that the Supreme Court should reconsider *Red Lion* and one of its underlying rationales known as the "scarcity" rationale. In opposing the FCC's petition for certiorari, NBC Universal wrote: "To the extent that the [Federal Communications] Commission argues that the so-called 'scarcity rationale' dictates that this Court apply a more permissive standard of review to its content-based restrictions on broadcasters' speech, this proffered rationale may make it necessary for this Court to reconsider its decision in Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969), the foundations of which are even more moth-eaten than those of *Pacifica*."[11] In briefing to the Second Circuit, the FCC cited *Red Lion* and referenced "spectrum scarcity" in arguing for a lenient standard of review for indecency regulation.[12] The Second

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[11] Brief in Opposition of NBC Universal and NBC Telemundo License Co., On Petition for a Writ of Certiorari, No. 07-582, Feb. 1, 2008, at 32 n.9.

[12] Specifically, the FCC cited FCC v. League of Women Voters, 468 U.S. 364, 376 (1984), *Red Lion*, and CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) for the propositions that "regulation of the broadcast spectrum—a scarce and valuable national resource" involves "unique considerations"; that there are more people wanting to

(footnote continued...)

Circuit itself suggested that "at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television," without distinguishing between indecency and other broadcast regulations.[13]

Despite these references, the Supreme Court need not reconsider *Red Lion* in this case, even if it reconsiders *Pacifica*. The FCC (1) did not rely on *Red Lion* or scarcity in its orders in this case. Moreover, this Court (2) has specifically held that *Red Lion* and *Pacifica* are unrelated and that the two cases, (3) rest on different premises, and (4) serve as precedent for different types of laws, (5) respond to different governmental interests, and (6) apply apparently even to different classes of media.

First, the FCC relied on *Pacifica*, not *Red Lion*, in its Omnibus Order,[14] its Golden Globes

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broadband than "frequencies to allocate" so there is no "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish"; that broadcasters granted "free and exclusive use of" the limited spectrum licenses can be "burdened by enforceable public obligations." FCC 2d Cir. Brief at 58.

[13] Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 465 (2007).

[14] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006) ("Omnibus Order").

Order,[15] and its Remand Order.[16] This Court need not, and cannot, evaluate a basis for an agency decision not provided by the agency.[17]

Second, this Court has recognized that *Red Lion* is not precedent for indecency regulation. In *Pacifica* itself, this Court explicitly rejected grounding indecency regulation on the *NBC/Red Lion* scarcity rationale though the FCC order upheld in *Pacifica* listed scarcity as one of its four bases for authority.[18] This Court disregarded that basis and rested its decision instead on the FCC's three other bases.[19] Dissenting in that case, Justice Brennan commended the majority opinions for rejecting scarcity as a basis for indecency regulation: "The opinions ... rightly refrain from relying on the notion of 'spectrum scarcity' to support their result. ... '[A]lthough scarcity has justified increasing the diversity of speakers and speech,

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[15] Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, at ¶ 3 n.4 (2004) ("Golden Globes").

[16] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 13299, n.18 (2006) ("Remand Order").

[17] *C.f.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43(1983) (a court may not "supply a reasoned basis for the agency's action that the agency itself has not given.").

[18] Pacifica, 438 U.S. at 731, n. 2.

[19] *Compare id.* at 731 n.2 with *id.* at 748-51.

it has never been held to justify censorship.'"[20]

Third, as the Court noted, *Red Lion* and *Pacifica* rest on different bases. *Red Lion* rests not only on "the scarcity of broadcast frequencies," but also on the government's "role in allocating" those frequencies, and the "legitimate claims" of competing "possible users" of the spectrum.[21] *Pacifica*, by contrast, rests on broadcast media's pervasiveness, accessibility to children, and invasiveness.[22]

Fourth, the governmental interests furthered in indecency cases differ from those in *Red Lion* cases. The government interest in indecency is generally to protect children from harmful materials.[23] The government interest in *Red Lion* cases is to ensure the public's free speech rights to "the widest dissemination of diverse and antagonistic sources,"[24] as well as the right to "receive suitable access to social, political, esthetic, moral and other ideas and experiences,"[25] and the right to the most effective use of the spectrum for communication.

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[20] *Id.* at 770, n. 4 (Brennan, J., dissenting) (citations omitted).

[21] *See Red Lion*, 395 U.S. at 400-01.

[22] Pacifica, 438 U.S. at 748-51.

[23] *See, e.g.*, Sable Communications, 492 U.S., at 126.

[24] *See* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[25] *See Red Lion*, 395 U.S. at 390.

Fifth, *Pacifica* and *Red Lion* apply to different types of laws.[26] *Pacifica*'s constitutional holding applies exclusively to laws restricting indecency.[27] *Red Lion* applies to more pervasive laws, including (1) laws structuring the media environment to ensure the widest dissemination of diverse sources (such as ownership limits, must-carry rules, and universal service mandates),[28] (2) laws ensuring an informed citizenry through promoting political, educational, or noncommercial

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[26] *Accord* Br. Amici Curae Brennan Center for Justice et al. at 16-17 (noting scarcity only justified either "structural regulation of industry" or "certain public interest obligations such as equal access for political candidates" (or content-based promotion of democratic content) but not "censorship" (or content-based suppression)); *see also* 2d Cir. Br. Amici CDT et al., at 21, n.26 (distinguishing *Pacifica* from Prometheus Radio Project, 373 F.3d 372).

[27] *See, e.g.*, Action for Children's Television v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc); Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 743-47 (1996) (Breyer, J., plurality) ("*Denver Area*").

[28] *See, e.g.*, C. Edwin Baker, *Turner Broadcasting: Content-based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57; Michael J. Burstein, Note, *Towards a Standard for First Amendment Review of Structural Regulation*, 79 N.Y.U. L. REV. 1030 (2004); Marvin Ammori, *Content Neutrality and Promotion of Content*, 61 FED. COMM'S L. J. __ (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139961.

content,[29] and (3) spectrum policy rules, from satellite television to wireless Internet. These

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[29] These laws are not considered "content-based" as, doctrinally, content-based laws are those laws singling out particular content for suppression. *See, e.g.*, Ammori, *supra* note 28; Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65 (1994). Laws designed promote political, educational, and noncommercial content do not singling out any content *for suppression*. Contrast a library stocking its shelves with one book, out of the millions of options, which does not suggest hostility to particular content, with removing a controversial book from its shelves, which does. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853 (1982); Pratt v. Independent Sch. Dist. No. 831, Forest Lake, Minn., 670 F.2d 771, 773 (8th Cir. 1982). In a range of different areas, promoting democratic speech is subject to little scrutiny; these areas include subsidies, limited public fora, speech exceptions, exceptions in copyright laws, media policy, and broadcast regulation. *See* Ammori, *supra* note 28. *See also* Regan v. Taxation without Representation of Wash., 461 U.S. 540 (1983) (government need not meet intermediate or strict scrutiny to subsidize some nonprofit speech without subsidizing other nonprofit speech); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (same for limited public fora); Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217 (2000) (same); Walsh v. Brady, 927 F.2d 1229 (D.C. Cir. 1991) (same for exceptions to general laws for certain speech purposes); Weinberg v. Chicago, 310 F.3d 1029, 1035-36 (7th Cir. 2002) (same); Eldred v. Ashcroft, 537 U.S. 186, 219-20 (2003) (same for copyright law, which provides exceptions to foster "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," 17 U.S.C. § 107).

structural, informational, and spectrum policies receive different—and far more deferential—treatment and analyses than laws targeting and restricting indecent speech.

Sixth, *Pacifica* and *Red Lion* affect different media. *Pacifica* applies only to radio and television terrestrial broadcasting and perhaps to programming on the basic cable tier.[30] *Red Lion*'s has been cited as support for cases involving terrestrial radio and TV broadcasting, satellite broadcasting,[31] and (though the *Red Lion* "scrutiny standard" does not explicitly apply) for the regulation of phone companies[32] and cable companies.[33]

The Court's precedent therefore recognizes that the Court should not rely on or question *Red Lion* here.

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[30] *See Denver Area*, 518 U.S. at 743-47 (Breyer, J., plurality) (analyzing by analogy to *Pacifica* rather than explicitly announcing a constitutional standard).

[31] *See, e.g., Time Warner I*, 93 F.3d at 975-79. *See also* Satellite Broad. & Commc'ns Ass'n v. FCC, 275 F.3d 337, 356 (4th Cir. 2001) (finding the challenged rules met even *Turner* scrutiny).

[32] United States v. AT&T, 552 F.Supp. 131, 183-86 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

[33] *Turner II*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring).

II. REVISITING *PACIFICA* WOULD AFFECT A LIMITED DOMAIN, WHERE STRICT SCRUTINY MAY ALREADY APPLY

Revisiting *Pacifica* would affect, at most, indecency regulation in broadcast media, and upset a plurality opinion regarding cable basic-tier programming.[34] This effect would likely be small, as the FCC has historically been cautious in policing indecency.[35]

Moreover, revisiting *Pacifica*, as broadcasters seek, may not even affect the reigning scrutiny standard among many circuit courts. In *Fox v. FCC*, below, the Second Circuit did not reach the constitutional question, but instructed the FCC that strict scrutiny may soon apply to broadcast indecency regulation.[36] The only circuit court cases since *Pacifica* that reached the constitutional issue interpreted *Pacifica* to apply strict, not intermediate, scrutiny to broadcast indecency regulation.[37] The Supreme Court case applying *Pacifica* to

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[34] *Denver Area*, 518 U.S. at 743-47 (Breyer, J., plurality).

[35] *See, e.g.*, Fox v. FCC, 489 F.3d 444, 450 (2007) (discussing the Commission's historically "restrained enforcement policy.").

[36] *See* Fox, 489 F.3d at 465.

[37] *See* Action for Children's Television, 58 F.3d at 660 (applying "strict scrutiny to regulations of this kind regardless of the medium affected by them," and asserting the court's "assessment ... must necessarily take into account the unique context of the broadcast medium.").

basic cable did not announce a standard, but merely reasoned by analogy to *Pacifica*.[38] Therefore, no case relying on *Pacifica* has explicitly applied a standard other than strict scrutiny. So reconsidering *Pacifica* to provide broadcasters greater breathing room on indecency would likely have a minimal, predictable impact.

III. REVISITING *RED LION* WOULD UNPREDICTABLY AFFECT NUMEROUS FOUNDATIONAL LAWS SUPPORTING MEDIA DIVERSITY AND DEMOCRATIC CONTENT IN NUMEROUS MEDIA

Because of the confusion surrounding *Red Lion* and the interests of both sides of this case to extend *Red Lion*, we provide our understanding of how *Red Lion* continues to serve as a bedrock for valuable telecommunications policy and how questioning *Red Lion* would throw media, spectrum, and Internet policy into chaos.

Despite the repeal of rules like the fairness doctrine and the personal attack rule, *Red Lion* and its associated line of cases remain precedent for three major classes of laws, each of which have numerous subclasses, and all of which differ from indecency regulations.

First, structural regulations include

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[38] *Denver Area*, 518 U.S. at 743-47 (Breyer, J., plurality).

attempts to foster the wide dissemination of diverse and antagonistic sources such as through ownership limits, access rules, and build-out/universal service rules. Second, laws meant to promote an informed electorate include limited attempts to ensure political, educational, and noncommercial programming. Third, laws structuring spectrum include wide-ranging and diverse regulatory choices. None faces or should face strict or intermediate constitutional scrutiny.

Since every American has a legitimate claim to speak using the radio spectrum,[39] this Court has recognized that the government must receive *some* deference to balance those rights in structuring access to the radio spectrum to promote First Amendment goals.[40] In balancing those rights, the government must recognize that the "rights of the public" are "paramount"[41]—not the rights of powerful lobbies such as the broadcasters, cable operators,

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[39] *See Red Lion*, 395 U.S. at 389 ("[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused.").

[40] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102-03, 110 (1973).

[41] *Red Lion*, 395 U.S. at 390 ("But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.").

phone companies, or even the technology companies.[42] Those paramount public rights include the right to diverse sources and political information.

A. *Red Lion* Supports Structural Regulation for Universal Access to Diverse Information Sources

Red Lion has served as precedent supporting the government's ability to structure media to foster the "basic tenet" of American communications policy with two distinct parts.[43] The public should receive access to "information from diverse and antagonistic sources" and these

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[42] *See, e.g.*, J.H. SNIDER, SPEAK SOFTLY AND CARRY A BIG STICK: HOW LOCAL BROADCASTERS EXERT POLITICAL POWER (2006); Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373 (2007); Center for Responsive Politics, *Networks of Influence*, OPENSECRETS.ORG, Feb. 28, 2006 (providing figures that the communications industry spent at least $900 million on campaign contributions, lobbying expenditures and related spending between 1998 and 2004); Ken Auletta, *The Search Party: Google Squares Off with its Capitol Hill Critics*, NEW YORKER, Jan. 14, 2008.

[43] In line with this tenet, the first Congresses structured the postal system and postal subsidies to spread diverse sources of public information to all Americans. *See, e.g.*, RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700-1860s (1989). PAUL STARR, THE CREATION OF THE MEDIA 47-152 (2004); Ammori, *supra* note 28.

diverse sources should be disseminated widely to all.[44]

The Court has endorsed attempts to foster diverse information sources in cases involving broadcasting,[45] cable,[46] and newspapers,[47] and has upheld lower courts endorsing diversity of information sources through telephone networks.[48] In the seminal cable television case, *Turner Broadcasting Sys., Inc. v. FCC*,[49] the Court held that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[50] Despite recognizing this interest in every medium, the Court appears to grant the greatest deference to government attempts to promote diverse sources in the field of

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[44] *See* cases cited in note 4.

[45] *See, e.g.*, CBS, Inc. v. FCC, 453 U.S. 367 (1981).

[46] *Turner I*, 512 U.S. 622, 663 (1994); United States v. Midwest Video Corp., 406 U.S. 649, 668, n.27 (1972) (plurality opinion).

[47] *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also NCCB*, 436 U.S. 775, 799 (1978) (upholding limitation on broadcasters merging with the local newspapers).

[48] *See* United States v. AT&T, 552 F.Supp. 131, 183-86 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

[49] 512 U.S. 622, 663 (1994).

[50] *Turner I*, 512 U.S., at 663; Turner II, 520 U.S. at 190; *id.* at 227 (Breyer, J., concurring).

broadcasting or structuring spectrum.[51]

Laws that further diverse and antagonistic sources include ownership limits and must-carry rules. For example, relying partly on *Red Lion*, this Court[52] and lower courts[53] have upheld broadcast media ownership limits (for radio and TV,[54] locally and nationally,[55] vertically[56] and horizontally[57]) with minimal scrutiny under the First Amendment, as fostering diverse sources.[58]

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[51] We say this largely because the Court does not impose a narrow tailoring requirement under *Red Lion*, as discussed below.

[52] *NCCB*, 436 U.S. 775 (1978).

[53] *See, e.g.*, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 167 (D.C. Cir. 2002).

[54] Prometheus Radio Project, 373 F.3d at 413, 428.

[55] *Id.* (addressing three local caps); *cf. also* United States v. Storer Broad. Co., 351 U.S. 192 (1956) (upholding national cap in face of statutory challenges).

[56] *See* Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 476-77 (2d Cir. 1971) (upholding financial interest and syndication rules and prime time access rules); *see also id.* at 477 ("[T]he prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the 'diversity of programs and development of diverse and antagonistic sources of program service.' ").

[57] *See* Prometheus Radio Project, 373 F.3d at 413, 428.

[58] *NCCB*, 436 U.S. at 802 ("The regulations are a *reasonable means* of promoting the public interest in diversified mass communications; thus they do not violate

(footnote continued...)

Relying on *Red Lion*, the D.C. Circuit upheld a law granting noncommercial programmers must-carry rights to digital broadcast satellite systems, again with minimal scrutiny as fostering diverse sources.[59]

This Court has also upheld attempts to ensure the "widest possible dissemination" of such information sources, including the FCC's allocation of broadcast licenses to favor universal service—ensuring at least one station per locality before ensuring multiple stations per larger localities.[60] The FCC routinely imposes build out requirements on wireless licensees[61]

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the First Amendment rights of those who will be denied broadcast licenses pursuant to them.") (emphasis added).

[59] *Time Warner I*, 93 F.3d at 975-79.

[60] FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 360 (1958) ("Allentown had three local stations; Easton only one. The Commission recognized that Allentown was a city almost triple the size of Easton and growing at a greater pace, but held that Easton's need for a choice between locally originated programs was decisive."). *See also* Amendment of Section 3.606 of Comm'n's Rules & Regulations, Sixth Report & Order, 41 F.C.C. 148, 167 (1952) (providing as the first three priorities of allocation: "(1) To provide at least one television service to all parts of the United States. (2) To provide each community with at least one television broadcast station. (3) To provide a choice of at least two television services to all parts of the United States.").

[61] *See, e.g.*, Service Rules for the 698-746, 747-762 And 777-792 Mhz Bands, WT Docket No. 06-150, May 14, 2008, 2008 WL 2066005, at *5 (regarding build out for public

(footnote continued...)

without the First Amendment challenges raised by cable operators for similar build-out laws.[62]

Unlike indecency laws, none of these laws suppress disfavored content. Questioning *Red Lion* here would shake every one of these structural laws.

B. *Red Lion* Supports Political and Educational Content Ensuring an Informed Citizenry

In the broadcast arena, this Court has consistently upheld laws designed to promote an "informed electorate"[63] by promoting "suitable access" to diverse political and educational

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safety network); Written Statement of the Honorable Kevin J. Martin, Chairman Federal Communications Commission, April 15, 2008, 2008 WL 1733628, at *4 ("To help ensure that rural and underserved areas of the country benefit from the new services that this spectrum will facilitate, the Commission adopted the most aggressive build-out requirements ever applied to wireless spectrum.").

[62] *See, e.g.*, Century Federal, Inc. v. City of Palo Alto, 719 F.Supp. 1552, 1554 (N.D. Cal. 1987) (striking down cable build-out rules). Even when applying a more intrusive scrutiny standard than *Red Lion*, this Court has upheld attempts to ensure universal access to local news and public information through cable. *See Turner I*, 512 U.S. at 652 (upholding broadcaster must-carry on cable partly "to ensure that broadcast television remains available as a source of video programming for those without cable.").

[63] *See Turner I*, 512 U.S. at 648.

speech. That is, government can engage in "efforts to enhance the volume and quality of coverage of public issues through regulation of broadcasting."[64] In *CBS, Inc. v. FCC*, the Court upheld the requirement that broadcasters grant access to federal candidates, because the rule promoted "the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[65] In 2004, this Court also relied on *Red Lion* to support disclosure requirements regarding political campaigns, meant to inform the public about political campaign activity.[66] In 1975, the Second Circuit upheld the FCC's program access rules forbidding television stations in the 50 largest metropolitan areas from broadcasting network programs in more than three of the four evening hours; these rules provided exceptions to encourage news programming, including exceptions "one-half hour of 7 P.M. network news programs provided the station had carried one hour of local news

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[64] *NCCB*, 436 U.S. 775, 800 (1978).

[65] CBS, Inc. v. FCC, 453 U.S. 367 (1981). Markets often fail to provide the optimal amount of public information based on economic considerations. *See* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 1-96 (2002).

[66] McConnell v. Federal Election Commission, 540 U.S. 93, 237, 240-41 (2003) (upholding requirements that broadcast requirements regarding elections, relying on *Red Lion*).

before seven o'clock" and "on-the-spot news and political broadcasts."[67] In 1996, the FCC adopted rules that effectively required broadcasters to air three hours of children's educational programming every week, analyzing the requirement under *Red Lion* and concluding the rules were constitutional.[68]

In addition to these limited content obligations, many of the structural rules discussed above also seek to promote an informed electorate. A structure of diverse sources is assumed to produce diverse political views and content and to better inform voters.[69]

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[67] National Assoc. of Independent Television Producers & Distributors v. FCC, 516 F.2d 526, 529, 537-38 (2d Cir. 1975).

[68] Children's Television Programming, 11 FCC Rcd 10660, 10729-34 (1996). These rules implemented the The Children's Television Act of 1990, 47 U.S.C. §§ 303a-303b. The accompanying Senate Report analyzed the constitutional issues and concluded the Act was constitutional under *Red Lion*. S. Rep. No. 227, 101st Cong., 1st Sess. 17 (1989).

[69] *See, e.g.*, United States v. Associated Press, 52 F.Supp. 362 (S.D.N.Y. 1943) ("[T]he First Amendment ... presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."); *NCCB*, 436 U.S. at 797 ("[I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.") (quoting the FCC).

Must-carry rules often favor sources that provide noncommercial educational content.[70]

C. *Red Lion* Supports Flexible and Dynamic Spectrum Policy to Further Citizen and Consumer Rights

Beyond structural rules and political and educational access rules, spectrum policies also rest on *Red Lion* and the cases resting on spectrum scarcity. The FCC structures spectrum for private use; the National Telecommunications and Information Administration allocates, assigns, and regulates government spectrum. Both do so in conjunction with international coordination and treaty obligations.[71] In structuring spectrum use, the FCC adopts a wide range of possible technical and economic plans, permitting experimentation and development based on the economic and technical characteristics of the spectrum at issue. The FCC has issued licenses for terrestrial radio broadcasting, terrestrial television broadcasting, satellite television broadcasting, satellite radio broadcasting, wireless cell phone networks, taxi dispatching, public safety, unlicensed uses, microwaves, etc. The FCC has also used several models for

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[70] *Time Warner I*, 93 F.3d at 975-79 (must-carry for noncommercial stations on satellite); *cf. Turner I*, 514 U.S. at 630 (same for cable).

[71] *See, e.g.*, Biennial Regulatory Review, International Bureau, 22 F.C.C.R. 3138, 3142 (2007).

assigning licenses, including comparative hearings, first-come first-serve, lotteries, and auctions. The FCC has used several models for the rights attached to licenses, from flexible-rights licenses to licenses for particular services. In establishing licenses, the FCC determines the geographical makeup of band plans, such as national licenses, large regional licenses, or small local licenses, or a mixed combination.[72] Often, the FCC must "clear" bands of existing users.[73] The FCC must also determine the length of any license term, which could vary greatly, in theory, from years to seconds. For example, recently, a Google co-founder proposed a simple model for government agencies to auction off particular spectrum every second, using algorithms similar to those used on Google's search engine to auction advertising

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[72] *See, e.g.*, Service Rules for the 698-746, 747-762, and 777-792 MHz Bands, Second Report & Order, 22 FCC Rcd. 15,289 (August 10, 2007) ("*700 MHz Auction Order*").

[73] *See, e.g., id.* at 15296 ("The DTV Act set a firm deadline of February 17, 2009 for the 700 MHz Band spectrum to be cleared of analog transmissions and made available for public safety and commercial services as part of the DTV transition."); Improving Public Safety Communications in the 800 MHz Band, 19 F.C.C.R. 14,969, 14978 (2004) ("We require Nextel to reimburse UTAM Inc. (UTAM) for the cost of clearing the 1910-1915 MHz band, and to clear the 1990-2025 MHz band of BAS incumbents within thirty months of the effective date of this Report and Order.").

spots.[74]

Beyond licensing, the FCC authorizes specific "unlicensed" uses. Though the 1969 *Red Lion* Court could not have anticipated this development, the advances in technology have eliminated the need to assign licenses to particular users.[75] End-user "smart radios" can manage interference on their own using advanced computing technologies.[76] The most famous example of unlicensed use today is likely wi-fi wireless Internet.[77] Today, almost every laptop is manufactured with wi-fi capability built into it and billions use the technology daily. Innovators created wi-fi by using unlicensed allocations of "garbage spectrum bands" long considered useless, which had been used by microwaves and garage door openers.[78] Minimal

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[74] Elizabeth Woyke, *Google's Mobile Ambitions*, FORBES, May 22, 2008.

[75] *See* Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287 (1998); Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J.L. & TECH. 25 (2002).

[76] Benkler, *Overcoming Agoraphobia*, *supra* note 75, at 394-400.

[77] *See, e.g.*, FCC, *Spectrum Policy Task Force Report*, ET Docket No. 02-135 (rel. Nov. 2002), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.doc.

[78] *See, e.g.*, *Wireless: WiFi: Unlicensed : Part 15*, CYBERTELECOM, http://www.cybertelecom.org/broadband/Wifi.htm.

certification ensures unlicensed devices do not interfere.[79] Indeed, as a matter of physics, each unlicensed device may increase capacity—not increase interference—because devices can provide capacity in a peer-to-peer, "mesh" network; each device uses other devices as "hops" to transmit messages.[80] That is, the more devices, the more capacity for all.[81]

The major, and minor, decisions of communications policy should not be subject to second-guessing by non-expert judges, who could "constitutionalize" and handcuff the FCC's broad, flexible mandate to regulate the spectrum to serve the public's interest. Even if this Court would subject spectrum policy to intrusive second-guessing by the judiciary, this case is not the appropriate vehicle for that decision.

D. *Red Lion* Does Not Support Content-Based or Viewpoint-Based Suppression of Disfavored Speech

Red Lion does not support content-based suppression. While *Red Lion* serves as precedent for ownership limits and must-carry laws, political access laws, and spectrum policy, some have criticized the *Red Lion* standard for

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[79] *See, e.g.*, 47 C.F.R. § 15.5.

[80] Benkler, *Some Economics*, *supra* note 75, at 44-47.

[81] *Id.* The FCC can also permit limited unlicensed uses in bands that are licensed. *See* FCC, supra note 77, at 5 (discussing underlays).

permitting viewpoint- or content-based decisions. Some argue that the fairness doctrine itself could be enforced to reduce the diversity of viewpoints and to target certain disfavored views.[82] Reconsidering *Red Lion*, however, would not affect the fairness doctrine, which is long-repealed.[83] Even were this argument at issue here, however, the argument merely suggests that this Court misapplied the *Red Lion*/basic-tenet standard in evaluating the fairness doctrine, not that the *Red Lion* standard should be abandoned.[84] Indeed, in *Red Lion*, the Supreme Court said it would revisit the issue of the fairness doctrine's constitutionality if evidence demonstrated the doctrine reduced, rather than enhanced, the quality and diversity of political coverage.[85] Years later, the FCC abandoned the doctrine based on such

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[82] Syracuse Peace Council v. FCC, 867 F.2d 654, 665 (D.C. Cir. 1989).

[83] *See* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) (fairness doctrine); Radio-Television News Directors Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000) (political editorial and political attack rules).

[84] *See, e.g.*, Yochai Benkler, *Free Markets vs. Free Speech: A Resilient Red Lion and its Critics*, 8 INT'L J.L. & INFO. TECH. 214, 215 (2000).

[85] *Red Lion*, 395 U.S. at 393 ("And if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.").

evidence.[86]

And, in the case of broadcast regulation, courts have been able to determine where government is attempting to target and suppress particular views and particular content, applying a heightened scrutiny for suppressing editorializing,[87] commercial speech,[88] indecency,[89] or particular political viewpoints.[90] Under the *status quo*, *Red Lion* is not permitting content-based laws. If *Red Lion* were, broadcasters can bring the appropriate case.

IV. UNDER ANY SCENARIO, NOTHING GOOD COMES FROM REVISITING *RED LION*, AN IRRELEVANT CASE HERE

If the Court reconsiders *Red Lion*, either all spectrum licenses would be constitutionally suspect or constitutionally protected such that modifications would face heighted scrutiny.

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[86] Syracuse Peace Council, 867 F.2d 654.

[87] *See* FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

[88] *See, e.g.*, Greater New Orleans Broadcasting Ass'n v. FCC, 527 U.S. 173 (1999).

[89] *See* Action for Children's Television v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc).

[90] *See* News America Publishing Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).

A. Under Scenario #1: Reconsidering *Red Lion* Results In Chaos By Rendering Unconstitutional Every Single FCC Spectrum License

Reconsidering *Red Lion* could undermine every spectrum license held by a private or government party. Ordinarily, under cases like *Hague v. CIO*[91] and *Forsyth County, Georgia v. Nationalist Movement*,[92] government cannot license speakers. More importantly, government cannot silence the millions of Americans lacking a license.[93] Yet government can license speakers in broadcasting unlike in parks, print journals, or the Internet. Spectrum licensing rests not on *Hague v. CIO* and *Forsyth County* but on the *Red Lion* and the "scarcity rationale." This scarcity rationale was the subject of sustained attack by some academics and judges, based on two main arguments.[94] First, scarcity is less significant now than when *Red Lion* was decided, because technological changes enable more broadcasters to use the spectrum. Second, scarcity is a fact of economic life; like spectrum, ink and paper used

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[91] 307 U.S. 496 (1939).

[92] 505 U.S. 123 (1992)

[93] *Cf. Red Lion*, 395 U.S. at 389 ("[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused.").

[94] *See, e.g.*, Time Warner Entm't Co., L.P. v. FCC, 105 F.3d 723 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*); R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959)

by newspapers are scarce. Rather, many of these critics argue, the response to scarcity should be creating and enforcing property rights in spectrum—though even its proponents admit creating such rights would be highly complicated.[95]

But property rights are neither the only option nor the constitutionally preferred option under *Hague v. CIO*. With advances in technology, unlicensed use of spectrum is possible and efficient and ensures all Americans can use the spectrum to speak.[96] As noted, wi-fi uses unlicensed spectrum, providing million of Americans with access to the Internet. The FCC currently has an open proceeding considering whether to allocate "white spaces" on the television dial to unlicensed devices.[97] Though a television dial may include 60 channels, in any town fewer than half are in use, and other channels are allocated to neighboring and regional cities. Permitting unlicensed uses on the unused white spaces would enable "wi-fi" on steroids, making high-speed, mobile, open

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[95] Dale N. Hatfield & Phil Weiser, *Toward Property Rights in Spectrum: The Difficult Policy Choices Ahead*, Cato Institute Policy Analysis Series No. 575, August 17, 2006, http://ssrn.com/abstract=975679.

[96] Yochai Benkler & Lawrence Lessig, *Net Gains: Will Technology Make CBS Unconstitutional?*, NEW REPUBLIC, Dec. 14, 1998, at 12.

[97] *See* Unlicensed Operation in the TV Broadcast Bands, 19 FCC Rcd 10018 (2004).

Internet access available and affordable to far more Americans,[98] at a time when we have fallen alarmingly behind our global competitors in Internet speeds, price, and adoption.[99] The Internet, of course, provides access to thousands of websites and channels available online. Through ubiquitous unlicensed Internet access, Americans could have access to 3500 channels of high-definition television—not merely a few dozen—through one noncommercial website alone.[100]

Rather than cause interference, the initial result of unlicensed uses would probably result in far more effective use of the spectrum for far more communications through open Internet systems. Currently, most spectrum is not used at any given time.[101] There is no benefit to letting spectrum lie fallow. Unlike water or

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[98] *See* Woyke, *supra* note 74 (quoting Google co-founder Larry Page).

[99] *See* Derek Turner, Broadband Reality Check II (2006), at 2, *available at* www.freepress.net/docs/bbrc2-final.pdf.

[100] *See* Miro - Free, Open Source Internet TV and Video Player, http://www.getmiro.com/.

[101] *See* FCC, *supra* note 77, at 3-4 ("preliminary data and general observations indicate that many portions of the radio spectrum are not in use for significant periods of time); Free Press & New America Foundation, *Measuring the TV "White Space" Available for Unlicensed Wireless Broadband*, Jan. 5, 2006, http://www.newamerica.net/files/whitespace%20summary.pdf.

food, we cannot "save" unused spectrum for later communications, commerce, or public safety.[102] Indeed, government's failure to put such speech resources to use may itself violate the First Amendment, and unlicensed uses better serve freedom of speech.[103]

As a result, to the extent that reconsidering *Red Lion* could undermine the reigning "scarcity rationale," government may be required to stop licensing speakers and to permit *all* Americans to use *all* of their airwaves to speak.[104] Without the scarcity rationale, under *Forsythe*, the government would have to defend each license under strict scrutiny, and would likely fail for most of them. Indeed, since fewer than 15% of Americans receive broadcast programming over the air (rather than through cable or satellite), the government would be unable to justify its gross misallocation of valuable spectrum to television broadcasting and to the vast white spaces designed to protect those unwatched signals.[105] Indeed, the real economic value in

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[102] *See, e.g.*, Benkler, *Some Economics*, *supra* note 75.

[103] *See, e.g.*, Harold Feld, *From Third Class Citizen to First Among Equals, Rethinking the Place of Unlicensed in the FCC Hierarchy*, 15 COMMLAW CONNSPECTUS 53 (2007)

[104] Perhaps with some dedicated bands or preemption rights for public safety and national security, which could likely meet strict scrutiny, depending on the plan.

[105] Sascha D. Meinrath & Michael Calabrese, *Unlicensed "White Space Device" Operations on the TV Band and the Myth of Harmful Interference*, March 2008,

(footnote continued...)

broadcast stations now derives from their must-carry rights for cable and satellite. This misallocation of spectrum resources cannot be justified under any heightened scrutiny.

Whether or not unlicensed uses should be expanded and licensed uses reduced as a policy matter, this Court should not now decide this issue as a constitutional matter. Doing so would throw into doubt every single one of the thousands of spectrum licenses conferred by the FCC or held by the government, even though this case is limited to a few particular indecent remarks on broadcast television.

B. Under Scenario #2, Reconsidering *Red Lion* Results in Chaos By Granting Incumbent Licensees Heightened Scrutiny and Constitutional Claims Regarding Any Advances in Spectrum Licensing

Another possible result of questioning *Red Lion* in dicta would turn over *Red Lion*'s domain to the intermediate scrutiny enunciated in *Turner Broadcasting Sys., Inc. v. FCC*.[106] This scenario is less likely than the first proposed

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http://www.newamerica.net/files/WSDBackgrounder.pdf. *See also* Bill McConnell, *Radical Thinker: Hazlett's Theories Attract Feds, Repel Broadcasters*, BROADCASTING & CABLE, Apr. 26, 2004.

[106] *Turner I*, 512 U.S. 622 (1994); *Turner II*, 520 U.S. 180 (1997).

scenario, but lower courts have applied *Turner*'s intermediate scrutiny to media ownership limits and must-carry rules to certain media.

The big difference between *Red Lion* scrutiny and *Turner*'s intermediate scrutiny is that *Turner* protects incumbent speakers at the expense of other speakers through a narrow tailoring requirement. Under *Red Lion*, laws that promote the basic tenet—the widest dissemination of information from diverse and antagonistic sources—are upheld. Under *Turner*, furthering the basic tenet is not enough; rather, doing so would meet only one prong of *Turner*—requiring government to further an important governmental interest.[107] The second major prong has been interpreted by lower courts to require the government to further that important goal in a narrowly tailored way *vis a vis* the incumbent speaker's speech. Therefore, under *Turner*, the government can promote the widest dissemination of diverse and antagonistic sources, but only if the "burden" on an incumbent speaker is relatively minimal.

As a result, under *Turner*'s intermediate scrutiny, lower courts have struck down, as violations of the freedom of speech, national cable ownership limits;[108] vertical cable

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[107] *Turner I*, 512 U.S. at 662-63.

[108] Time Warner Ent. Co., L.P. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001).

ownership limits;[109] common carriage rules applied to telephone video service;[110] and even rules meant to ensure competition and openness in the provision of. Internet service.[111] These cases—striking down ownership limits and access rules—ensure the narrowest dissemination of information from the same sources. Because many ownership and access rules aim to increase economic competition in concentrated media markets, *Turner* handicap government attempts to increase competition.[112]

Such cases and the lower courts' interpretation of *Turner*'s narrow tailoring requirement have encouraged cable operators and phone carriers to challenge dozens of rules imposed on them. Cable operators and phone carriers have challenged, under the First Amendment, rate regulation,[113] permitting local governments to provide cable service (and

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[109] *Id.*

[110] Chesapeake & Potomac Telephone Co. v. United States, 42 F.3d 181 (4th Cir. 1994).

[111] Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F.Supp. 2d 685 (S.D. Fla. 2000); *but see* AT & T Corp. v. City of Portland, 43 F.Supp.2d 1146, 1154 (D.Or. 1999), *aff'd in* 216 F.3d 871 (9th Cir. 2000) (rejecting First Amendment challenge, classifying the law as an economic regulation).

[112] *See* Time Warner Ent. Co., L.P. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001)

[113] *Time Warner I*, 93 F.3d 957, 965-67 (D.C. Cir. 1996).

upsetting cable monopolies),[114] rules forbidding exclusive agreements with apartment complexes,[115] retransmission consent,[116] carriage for public, educational, and governmental channels,[117] carriage for commercial leased access channels,[118] program access requirements,[119] and national horizontal and

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[114] Americable Int'l, Inc. v. Dept. of Navy, 129 F.3d 1271, 1275 (D.C. Cir. 1997) (rejecting a First Amendment argument against federal law permitting a local governmental authority to enter the cable business and compete with incumbent); Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 636-38 (11th Cir. 1990) (rejecting a First Amendment challenge by a cable operator that a city could not enter the cable business, holding that a city does not lawfully "abridge" speech by interfering with the continuation of an operator's "profitable position as the only speaker in a captive cable market.").

[115] *Cf.* AMSAT Cable Ltd. v. Cablevision of Ct., L.P., 6 F.3d 867 (2d Cir. 1993) (rejecting First Amendment claims by apartment complex owner and satellite operator against a state statute guaranteeing cable operators access to apartment complexes; holding the satellite operator had no free-speech right to be a monopoly and no right "to speak profitably," and the complex owner was not the school child in West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) unconstitutionally "compelled to speak").

[116] Daniels Cablevision, Inc. v. United States, 835 F.Supp. 1 (D.D.C. 1993), *aff'd in part on other challenges sub nom. Time Warner I*, 93 F.3d 957 (D.C. Cir. 1996).

[117] *Time Warner I*, 93 F.3d at 967-71.

[118] *Id.* at 971-73.

[119] *Id.* at 977-79.

vertical ownership limits.[120]

The *Turner* Court did not ask whether the means burdened more "speech" than necessary to advance government's interest. The Court seemed to ask whether the governmental means burdened more of the *incumbent*'s speech than necessary to do so. The law in *Turner* did not burden speech—it merely furthered the speech interests/economic interests of broadcasters and viewers of broadcast television over the speech/economic interests of cable operators and programmers, seeking to ensure the widest availability of local broadcasting content and diversity for the public.

Lower courts continue to invoke the *Turner* cases for a scrutiny-framework effectively constitutionalizing background property rules in the name of the First Amendment, even though *Turner* resists that notion. Justice Breyer's fifth-vote concurring opinion in *Turner II*, following a factual remand, is widely considered the key opinion in the *Turner* cases.[121] Justice

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[120] Time Warner Entertainment Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000) (facial challenge), Time Warner Ent. Co., L.P. v. FCC, 240 F.3d 1126 (D.C. Cir. 2001) (applied challenge).

[121] *See, e.g.*, National Cable & Telecommunications Association ("NCTA"), ex parte, CS Dkt. No. 98-120, filed July 9, 2002 (by Laurence Tribe, for cable industry lobby); NCTA, ex parte, CS Dkt. No. 98-120, filed Nov. 24, 2003 (same); NCTA ex parte, CS Dkt. No. 98-120, filed September 6, 2005 (by Cooper & Kirk LLP); National

(footnote continued...)

Breyer's opinion most explicitly rejected the notion of constitutionalizing background contract and property rules through the First Amendment, stating there were "important First Amendment interests on both sides of the equation," and the government must merely strike "a reasonable balance between potentially speech restricting and speech enhancing consequences" when acting to further the public's right to diverse and antagonistic sources.[122]

If *Turner* applied to spectrum, rules to promote the widest dissemination of diverse sources in spectrum would be subject to incessant constitutional litigation. These constitutional lawsuits would mean to overturn diversifying rules and ensure the narrowest diversity of sources for Americans, at the

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Association of Broadcasters ("NAB"), ex parte, CS Dkt. No. 98-120, filed August 5, 2002 (by Jenner & Block LLP); NAB, ex parte, CS Dkt. No. 98-120, filed June 6, 2006 (by Wiley, Rein & Fielding LLP).

[122] *Turner II*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring). *See also* Respondents' Oral Argument, 1995 WL 733396, at 34-35 (Dec. 6, 1995) United States v. Chesapeake & Potomac Tel. Co., 516 U.S. 415 (1996) (Justice Breyer suggesting the media regulation cases resemble *Lochner*). *See also id.* at *58 (Petitioners' Rebuttal Argument) (government counsel noting that free speech challenge to media regulation involved what "Solicitor General [Charles] Fried used to call Lochnerizing the First Amendment").

expense of both competition and democracy. Every broadcast ownership rule would receive heightened scrutiny, as would every access rule. Every single decision regarding the allocation, licensing, unlicensing, band clearing, and conditioning spectrum for any purpose will be subject to *Turner* attack, miring the FCC in years of litigation, expending valuable resources and time to uphold laws meant to foster greater competition and more diverse democratic participation.

We can take one example. The wireless industry is attempting to invoke *Turner*, though it does not apply, to overturn minimal rules requiring a spectrum-auction winner to sever and connect with all devices on its network.[123] Ironically, this open device rule is modeled on a long-enforced telephone rule that created the standard phone jack and eliminated AT&T's control of consumer phones.[124] This reading of *Turner* could invalidate even common carriage for wireless phone companies as overly burdensome on their "speech" rights to control

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[123] CTIA v. FCC, Case No. 07-1432 (D.C. Cir., filed Oct. 22, 2007) (challenging Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, 22 FCC Rcd 15289, ¶201 (2007)).

[124] *See* Use of the Carterfone Device in Message Toll Telephone Service, 13 FCC 2d 420 (1968); Tim Wu, *Wireless Carterfone*, 1 INT'L J. COMMUNICATION 389 (2007).

consumer devices and citizens' content.[125] Just like common carriage on wired and wireless networks, which promote the largest number of sources, such laws should receive little First Amendment scrutiny as furthering free speech goals.[126]

If the Court seeks to make a decision miring the FCC in years of First Amendment litigation over every change to an incumbent's spectrum rights, the Court should wait for an appropriate case.

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[125] *See* Chesapeake & Potomac Telephone Co. v. United States, 42 F.3d 181 (4th Cir. 1994).

[126] *See Turner I*, 512 U.S. at 684 (O'Connor, J., dissenting) ("it stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies").

CONCLUSION

For these reasons, the Court should not question *Red Lion* or the scarcity rationale. Both are irrelevant in this case and doing so would inject chaos and confusion into media, Internet, and spectrum policy.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF FOR *AMICI CURIAE* FORMER FCC COMMISSIONERS AND OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are former commissioners and officials of the FCC who oppose the recent indecency enforcement actions of the Commission.[1] We are a bipartisan group with different views about some issues of radio and television regulation, such as the fairness doctrine, but we are of one view on the issue before this Court: the FCC's new indecent policy overreaches the agency's statutory and constitutional authority.

Mark Fowler, currently a wireless radio project investor and entrepreneur, was Chairman of the FCC from 1981 to 1987. Jerald Fritz, Sr. Vice President and General Counsel for Allbritton Communications Company, served as Legal Advisor and Chief of Staff to FCC Chairman Mark Fowler from 1981 to 1987. Henry Geller, retired, served as General Counsel of the FCC from 1964 to 1970, as special assistant to the Chairman in 1970 and was Administrator of the National Telecommunications and Information Administration from 1978 to 1981. Newton N. Minow, Senior Counsel at Sidley & Austin, LLP, was Chairman of the FCC from 1961 to 1963. James H. Quello, a communications policy consultant, was FCC Commissioner from 1974 to 1997 and served as interim Chairman in 1993. Glen

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than the *amici curiae* or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. The parties have been given at least 10 days notice of the intention of *amici* to file.

O. Robinson, the David A. and Mary Harrison Distinguished Professor of Law Emeritus at the University of Virginia, was FCC Commissioner from 1974 to 1976. Kenneth G. Robinson, a Washington, D.C. communications attorney, was Senior Legal Advisor to FCC Chairman Alfred Sikes from 1989 to 1993, as well as senior policy advisor to five Assistant Secretaries of Commerce for Communications and Information.

As former FCC commissioners and officials, *amici* have been personally associated with the indecency controversy in the past, and we are not without sympathy for the FCC's concerns. Indeed, two of us joined in the Commission's original *Pacifica* decision,[2] and a third participated in an earlier decision that partly anticipated *Pacifica*.[3] However, we have been dismayed by a series of recent decisions that have transformed a hitherto moderate policy of policing only the most extreme cases of indecent broadcast programming into a campaign of regulatory surveillance that will chill the production of all but the blandest of broadcast programming. Unless the FCC's current indecency enforcement policy is halted, it will greatly curtail live broadcasts of virtually any event. It will also unbalance competition in media, by imposing far more stringent content rules on one group of competitors (broadcasters) than on other media, and for no compelling policy reason. For these reasons, we

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[2] *Pacifica Foundation Station WBAI(FM)*, 56 F.C.C.2d 94 (1975).

[3] *Eastern Educational Radio*, 24 F.C.C.2d 408 (1970).

support the court's opinion below as an attempt — albeit an incomplete one — to constrain the Commission's new crusade.

SUMMARY OF ARGUMENT

The FCC's policy towards broadcast indecency has evolved from a restrained effort to regulate clear, flagrant instances of indecent language by a handful of broadcast licensees and performers into an ever-expanding campaign against ordinary radio and television programming. In pursuit of a policy of protecting children against exposure to extremely offensive language, the Commission has embarked on an enforcement program that has all the earmarks of a Victorian crusade. To effectuate its new clean-up-the-airwaves policy, the Commission has radically expanded the definition of indecency beyond its original conception; magnified the penalties for even minor, ephemeral images or objectionable language; and targeted respected television programs, movies, and even non-commercial documentaries.

The FCC's actions in this case are but a few of several recent actions taken by the Commission that exceed the boundaries originally set by the FCC and assumed by the Supreme Court in the *Pacifica* decision. We endorse the decision of the court of appeals that the agency acted arbitrarily, in violation of the Administrative Procedure Act, by altering its past practice of not treating transitory and isolated utterances of offensive language as a violation of its indecency policy. Further, we do not believe the question of administrative arbitrariness can be

isolated from the deeper free speech issues that lie at the heart of this controversy. The Government's attempt to frame the issue before this Court as simply one of administrative procedure ignores what the court of appeals made clear: the issue of reasoned analysis is inextricably bound up with a fundamental constitutional question. While the court labeled its treatment of the First Amendment issue as *dicta*, it clearly expressed its judgment that the FCC's failure to offer a reasoned explanation for its new "'fleeting expletive' regime"[4] was not merely a procedural defect but was a constitutional defect as well. It was precisely for this reason that the court analyzed the First Amendment implications of the new policy, expressed with unambiguous clarity that the fleeting expletive policy is not within the scope of the *Pacifica* doctrine, and declared its skepticism that the FCC could provide a justification for its policy that would satisfy the First Amendment. For this Court to focus only on the administrative law issue and remand the constitutional question to the

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[4] While this case concerns the so-called "fleeting expletive" policy, we should note that the indecency regulations are also enforced against fleeting images as well. *See Complaints Against Various Television Licensees Concerning Their February 2, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760 (2006). The Court of Appeals for the Third Circuit recently reversed that decision, *CBS Corp. v. FCC*, _ F.3d _, 2008 WL 2789307 (3d Cir. July 21, 2008). Like the lower court in this case, the court found the FCC's sudden change in policy towards fleeting words or images to be arbitrary and capricious. It also held that the Commission had incorrectly imposed vicarious liability on CBS for the actions of independent contractors.

court of appeals would only prolong the uncertainty, and prolong the chilling of free speech.

However, even if the Court accepts the Government's argument that review should focus only on whether the FCC's change in policy was arbitrary and capricious, it cannot deal with that question adequately without taking into account the fact that the constitutional question bears directly on the rationality of the agency's action and whether any deference is due the agency. The deference that is normally accorded agency policy judgments cannot be defined or applied without evaluating how the FCC's new indecency policy affects First Amendment values. On that latter issue the agency bears a heavy burden of persuasion for which deference is inappropriate. Thus, even on the narrowest reading of the lower court's decision, it must be affirmed.

ARGUMENT

I. THE FCC'S EVOLVING STANDARDS OF INDECENCY

Until its 1975 decision in *Pacifica Foundation Station WBAI(FM)*, 56 F.C.C.2d 94 (1975), the FCC interpreted 18 U.S.C. § 1464 as an obscenity statute, governed by the constitutional definition and constraints of *Miller v. California*, 413 U.S. 15 (1973). The statutory proscription of "indecent or profane" language was treated as synonymous with obscenity. Although some of the pre-1975 cases might have been debatable candidates for the application of *Miller*, they had never forced the Commission to consider a different standard under

the rubric of indecency or profanity. *Pacifica* was different: George Carlin's monologue on the seven words that "you couldn't say on the public, ah, airwaves," clearly did not satisfy the first prong of *Miller's* definition of obscenity, requiring that the material "appeals primarily to the prurient interest." Confronted on the one hand with a choice of declaring Carlin's monologue to be obscene and inviting certain reversal in court, and on the other hand dismissing the complaint as *damnum absque injuria*, the FCC proceeded to invent a third option, which was to give independent significance to "indecency" but prescribe a different scope for its regulation than that applied to obscenity. Traditionally this Court has treated obscenity as unprotected speech and as such subject to total suppression. In contrast, indecent speech called simply for time and place regulation; the time being the period when children were likely to be in the audience,[5] the place being radio and television broadcasts.[6]

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[5] The FCC originally did not set precise time limits. The present period, set first by the FCC and then by Congress, is between the hours of 6 a.m. and 10 p.m.

[6] Indecency controls have been limited to broadcast media, but the current FCC Chairman, Kevin Martin, has endorsed extending indecency controls to cable and satellite providers. *See Broadcast Decency Enforcement Act of 2004: Hearings on H.R. 3717 Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong. 87 (2004) (Statement of Kevin Martin, Commissioner, FCC). Even assuming the continued viability of *Pacifica*, extending indecency beyond broadcasting would be deeply problematic in light of *United States v. Playboy Entertainment*

The Commission's move was novel; there was no judicial precedent and little administrative precedent to support it. But it was also very limited. Except where it qualified as obscenity, indecent language was generally confined to that describing "sexual or excretory activities and organs" in a manner that was "patently offensive" as measured by contemporary community standards for the broadcast medium, at times of day when there is a reasonable risk that children may be in the audience. 56 F.C.C.2d at 97-98. The Commission made clear that it was concerned only with "clear-cut, flagrant cases" and emphasized "that it would be inequitable to hold a licensee responsible for indecent language" when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Petition for Reconsideration of a Citizen's Complaint against Pacifica Foundation Station WBAI(FM)*, 59 F.C.C.2d 892, 893 n.1 (1976). This announced policy of restraint was critical to how this Court viewed the new doctrine when it affirmed the FCC in 1978. *Pacifica Found. v. FCC*, 438 U.S. 726 (1978). As Justice Powell noted in a concurring opinion, "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 756, 760, 761.

Group, Inc., 529 U.S. 803 (2000), where the Court held that the ability to block cable channels distinguished cable from broadcasting and thus required a higher degree of constitutional scrutiny. *See also Reno v. ACLU*, 521 U.S. 844 (1997) (*Pacifica* cannot be applied to the Internet); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (*Pacifica* cannot be applied to telephone where there are adequate means of preventing access by children to "dial-a-porn" messages).

The FCC honored that expectation. Immediately after the Supreme Court affirmed *Pacifica*, the FCC rejected a petition by Morality in Media to deny a license renewal for one of the foremost educational stations in the country on the ground that it had consistently broadcast "offensive, vulgar and otherwise harmful material to children." *WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978). The Commission held that the Court's decision "affords this commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding." *Id.* at 1436. To underscore the point, then-Chairman Charles Ferris announced that another case like *Pacifica* was "about as likely to occur again as Halley's Comet." Charles D. Ferris, Chairman, FCC, Address to New England Broadcasters Assoc. (July 21, 1978).

Unfortunately Ferris's prediction was unduly optimistic. Halley's Comet makes a periodic appearance about every 76 years; indecency reappeared before the FCC in just nine. In 1987, the FCC was drawn back into the indecency issue by the appearance of "shock radio" that was designed to push the limits of provocative programming beyond what Carlin had attempted a decade earlier. Still, the FCC responded with restraint. It revised its post-*Pacifica* view that the enforcement policy was limited to the precise seven words of Carlin's famous monologue and reinstated the original "generic" policy instead. The Court of Appeals for the District of Columbia affirmed the FCC's generic policy, albeit not without reservation and with an admonition to

the FCC to proceed cautiously. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Echoing Justice Powell in his *Pacifica* concurrence, the court pointedly noted its assumption that "the potential chilling effect of the FCC's generic definition will be tempered by the Commission's restrained enforcement policy." *Id.* at 1340 n.14

The decision was to be the first act of a three-*ACT* play in which the FCC, Congress, and the court of appeals took turns exploring the permissible limits of the new indecency regime.[7] We will not examine the plot in detail except to observe that in the course of the play, three things were firmly established. *First*, the proscription on indecency was limited to certain hours; the First Amendment forbids a 24-hour ban.[8] *Second*, the Commission was required to apply the indecency restrictions on a consistent basis and was barred from discriminating against commercially sponsored programs or stations.[9]

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[7] There was a fourth *ACT* case, but it dealt only with a constitutional and statutory challenge to the procedures for enforcing 18 U.S.C. § 1464. *Action for Children's Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995). The court rejected the challenge.

[8] In the second "act," *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), the court struck down Congress's attempt in 1989 to eliminate the indecency "safe harbor."

[9] *See Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) (affirming the ban on indecency between the hours of 6 a.m. and 10 p.m. for all stations; reversing the use of broader period, 6 a.m. to 12 a.m., for commercial stations).

Third, the court was seriously concerned about the risk that the regulation of indecency could get out of hand. Its repeated references to the need for caution in defining and enforcing the restrictions, reversal of Congress's attempt to make the restrictions absolute, and insistence on a consistent and principled policy make clear that the court was alert to the danger that a policy of reining in a small number of broadcast provocateurs could easily become a vehicle for an unconstitutional morals crusade against the entire industry.

In the aftermath of the *ACT* cases, the Commission continued to view indecency as a problem of controlling a small number of rogue broadcasters and broadcast personalities like Howard Stern, whose syndicated talk show has been responsible for a very large percentage of all fines paid for indecent broadcasting over the past score years.[10] In 2001, the FCC issued a set of guidelines

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[10] In 1995, Infinity Broadcasting paid a then-record sum of $1.7 million to settle indecency complaints over a series of Howard Stern Shows. Paul Fahri, *Stern "Indecency" Case Settled; After 7-Year Fight With FCC, Broadcasting Firm to Pay $1.7 Million*, Wash. Post, Sept. 2, 1995, at F1. That was not the last of it. The Howard Stern Show continued to draw fines. A single show on April 9, 2003 resulted in the Commission issuing a notice of apparent liability, to Clear Channel stations carrying the show, for fines aggregating $495,000. *Clear Channel Broadcasting Licensees, Inc.*, 19 FCC Rcd 6773 (2004). The Howard Stern Show will no longer draw indecency fines. In January 2006 Stern left commercial radio to join Sirius, a subscription-based satellite radio provider. *See* Howard Kurtz and Frank Ahrens, *Sirius Lands a Big Dog: Howard Stern*, Wash. Post, Oct. 7, 2004, at A1. The FCC has not applied its indecency regulations to subscription media. *See Harriscope of Chicago*, 3 FCC Rcd

on indecency policy, but they did not announce any new policy. *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001).

Yet, the time was not far off when things would change — radically. In 2004 the FCC embarked on what then-Chairman Michael Powell described as the "most aggressive enforcement regime in decades." Hearings on H.R. 3717 at 79. He could have more precisely said "the most aggressive enforcement regime" *ever*. Not only did the Commission find more violations and impose more penalties in that one year than in the entire prior history of the indecency doctrine,[11] it greatly expanded the scope of what constituted indecency, as in its extraordinary and unprecedented ruling in the Golden Globe Awards decision that a single, spontaneous exclamation — "Fucking brilliant" — by Bono upon receiving the award was indecent. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 (2004) ("*Golden Globe*").[12] To

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757 n.2 (1988), *remanded on other grounds, Monroe Commc'ns Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990).

[11] In 2004, the FCC issued assessed nearly $8 million in proposed fines and settlements, compared to $440,000 a year earlier. So far the 2004 total is the high water mark for annual collection. *See Indecency Complaints and NALs: 1993-2006*, http://www.fcc.gov/eb/oip/ComplStatChart.pdf.

[12] In ruling that a single use of the F-word was a violation, the Commission overturned its own prior limitation of indecency to descriptions or depictions of "sexual and excretory activities and

magnify the impact still further, the FCC decided that each utterance of a forbidden word may be counted as a separate violation, instead of looking at a particular program as a single, integrated unit. *See Clear Channel Broadcasting*, 19 FCC Rcd at 6779.

The Commission's new campaign also moved beyond the traditional targets for indecency enforcement. With a few exceptions those targets for enforcement were radio talk shows that deliberately and repeatedly followed a pattern of provocative programming. In its new phase, however, the Commission has undertaken a close inspection of movies, regular television series, live events, and even educational documentaries, to locate objectionable language or images. Even critically honored television programs like "Without a Trace" and "NYPD Blue" have become targets of indecency patrols. *See, e.g., Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace,"* 21 FCC Rcd 2732 (2006) (finding violation and proposing forfeiture of $32,000 for each CBS owned or affiliated station carrying program); *Complaints*

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organs." To shore up this new expansion the FCC also declared that use of the F-word was "profane" — a definition that again departed from precedent, as well as from conventional linguistic understandings. As late as 1999, the Commission took the position that not only was mere profanity not part of its indecency policy, but it could not constitutionally be made a part. *See Federal Communications Commission, the Public and Broadcasting*, 1999 WL 391297 (a "manual" for the public, containing an overview of broadcast regulatory policy).

Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd 2664, 2696-98 ("*Omnibus Order*") (finding violation but imposing no forfeiture for "NYPD Blue" program), *on remand*, 21 FCC Rcd 13299 (2006) ("*Omnibus Remand Order*"), *rev'd sub nom. Fox Television Stations v. FCC*, 489 F.3d 444 (2d Cir. 2007).[13] "NYPD Blue" has been targeted twice. *See Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 FCC Rcd 3147, 3156 (2008) ("NYPD Blue") *appeal pending*, Nos. 08-0841-ag(L), 08-1424-ag(CON), 08-1781-ag(CON), 08-1966-ag(CON) (2d Cir.) (imposing forfeiture of $1.43 million for briefly depicting backside nudity).

II. *FOX* AND THE OMNIBUS ORDERS

The Commission's *Omnibus Order* and *Omnibus Remand Order* reversed by the court of appeals illustrate all of these radically expansionist moves.

To begin, the Commission has unmoored indecency from its original meaning of language that described or depicted sexual or excretory activities. In the new version indecency can mean as little as the casual use of an expletive. For example, in the *Omnibus Order* the Commission found that the

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[13] The Commission's remand decision in the *Omnibus Order* dismissed the complaints against "NYPD Blue" on a procedural ground; however, this dismissal does not alter the substance of its earlier finding that the program contained indecent and profane language. *See Omnibus Remand Order*, 21 FCC Rcd at 13328-29.

documentary, "The Blues: Godfathers and Sons," broadcast by a noncommercial educational station, was indecent because some of the artists being interviewed used the F-word or S-word. 21 FCC Rcd at 2684-85. Citing its earlier decision in *Golden Globe*, the Commission held that "any use of [the F-word] or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition." It went on to say that the S-word similarly "has an inherently excretory connotation." *Id.* at 2684. The Commission's new "inherency doctrine" is preposterously out of touch with the way language is used and understood today. It may be that Twila Tanner (in a live interview) describing a fellow contestant on "Survivor: Vanuatu" as a "bullshitter" was vulgar. *Id.* at 2698-2700. However, only a silly literalist would think that she was describing an excretory function.[14] When Cher (in another live

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[14] Given the Commission's view that excretory words inherently satisfy at least the first prong of its indecency test, presumably the same holds for the word "poop" — a word that is prominent in the title of a number of popular children's books, such as, "Everyone Poops," "Where's the Poop," "The Dog Poop Initiative," "The Truth About Poop." No doubt the Commission would say that while "poop" satisfies the first prong, it does not satisfy the second, "patently offensive," prong. Words like "ass" and "piss" and their derivatives are included in the Commission's catalog of "sexual or excretory activities," but they have been ruled not patently offensive — at least in the context presented. *See Omnibus Order*, 21 FCC Rcd at 2710-13. Thus, according to the Commission, it is offensive to call someone a "bullshitter," *id.* at 2698-2700, but it is all right to call him an "ass," *see id.* at 2712, or even a "dickhead," *id.* at 2696. You may never say "fuck 'em" — even in an off-handed way, *id.* at 2690-92 — but it is at least sometimes ok to say "up

broadcast) answered her critics by exclaiming "fuck 'em," *id.* at 2690-92, any viewer would understand that as a crude insult, not as an invitation for sexual activity.

In an attempt to bolster its expansive definition of indecency, the Commission in its 2004 *Golden Globe Awards* order, and again throughout the *Omnibus Order* and *Omnibus Remand Order*, declared that the F-word and S-word, and derivative words, are not only indecent, but also "profane" within the meaning of 18 U.S.C. § 1464. It defined "profane" to mean any language "so grossly offensive as to constitute a nuisance." *See, e.g., Omnibus Order*, 21 FCC Rcd at 2699. On that interpretation "profane" so completely overlaps "indecent" as to render the latter superfluous. For just that reason the court of appeals found the interpretation to be unreasonable *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 467 (2d Cir. 2007). We agree with that finding, but the larger import of the FCC's interpretation is to underscore just how ambiguous and subjective the process of content surveillance has become. The Commission has in effect inflated section 1464 to cover any language the Commission thinks constitutes a nuisance.

The concept of arresting a "nuisance" was, of course, always central to *Pacifica* — in both the Commission's formulation and the Court's — but there is a difference between an organizing concept

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yours" with all deliberate intensity, *id.* at 2712. (The FCC is silent as to whether the presence or absence of an accompanying digital gesture is relevant.)

and a set of rules for implementing it. In its original formulation the FCC did not claim that it had a free-roaming power to regulate the broadcast program schedule according to whether, in the FCC's *ad hoc* judgment, a particular program was a "nuisance." In fact it was once so concerned about opening a Pandora's box of enforcement demands that it limited the category of offending words to those of the Carlin monologue. That limitation was arbitrary, but it reflected an appreciation of the First Amendment dangers of allowing the policy to drift onto an open sea with no compass other than the label "nuisance" to guide it. Even when the Commission abandoned the seven-word limitation in favor of a more "generic" policy, it was mindful of the need to articulate limits on the scope of that policy and to adhere to restraint in its enforcement. Unfortunately, since 2004 the FCC seems to have concluded that it needs no compass other than its own *ad hoc* judgments, based on little more than its own subjective consideration of "context."

The FCC professes to consider the offending words (or images) in "context." While we agree that words and images should be assessed in context, context cannot be an excuse for the subjective and arbitrary judgments reflected in the FCC's current indecency jurisprudence. In the name of context the Commission mechanically recites that the offending language is "gratuitous" and "shocking," presumably to distinguish these cases from "Saving Private Ryan," where the repeated use of the same words is deemed to be "essential" to the artistic work. *See, e.g., Omnibus Order*, 21 FCC Rcd at 2685, 2688-89, 2692, 2696-99. Employing an artistic standard

unknown to real artistic directors, the FCC determines that the S-word is "essential" when it is part of a war film, but "gratuitous" when it is part of a television series about gritty police work in New York City. *See id.* at 2696-98 (distinguishing "NYPD Blue" from "Saving Private Ryan"). Perhaps the Commission intends to embrace Justice Stewart's famous test for obscenity: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

The plain fact is that "context" has now become a tool not for limiting the reach of the Commission's indecency regime, which was its original purpose, but for expanding it. This new expansiveness exposes the deeply troubling vagueness of indecency as a basis for regulation. The argument of unconstitutional vagueness had been earlier finessed based on FCC assurances of cautious enforcement. *See ACT I*, 852 F.2d at 1339-40. However, it can no longer be ignored, as the court below found: "[W]e are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecency." *Fox Television*, 489 F.3d at 464. Except for the Commission's stubborn refusal to acknowledge the problem it would go without saying that this vagueness not only offends due process norms of fair notice, it produces subjective and arbitrary judgments that enhance the chilling of protected speech.

What is at stake here is not simply the problem of assuring fair notice and equal treatment to broadcasters who have to discern the elusive — and

shifting — boundaries of indecency/profanity. Equally important is the loss of speech from self-censorship by risk-averse broadcasters who choose to steer clear of the landmines that the FCC's uncertain jurisprudence has created by avoiding anything that might conceivably give offense. And it will not be simply the Bono's and the Cher's the broadcasters will have to avoid. A Vermont public radio station recently chose the path of ultra caution when it came to hosting a debate among electoral candidates for the Senate. The station decided to bar one of the candidates because during a previous student forum he had lost his temper and called two students "shits." The station manager reported that he feared the candidate might again become excited and use similar language, thereby subjecting the station to the possibility of a forfeiture "as much as $325,000."[15] http://www.vnews.com/campaign2006/ussenate20061020.htm.

No doubt this manager was unusually risk averse, but a small public radio station might well think that the risk was not worth taking when it could be so easily avoided. Who could say that the manager is wrong? If the candidate had blurted out the S-word in a fit of fury during the broadcast, the station's non-commercial status or small size would not protect it. *See Omnibus Order*, 21 FCC Rcd at 2683-87 (San Mateo County Community College television station found in violation for expletives

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[15] This is the cap recently set by the Broadcast Decency Enforcement Act of 2005, Pub. L. 109-235, § 2, 120 Stat. 491, amending 47 U.S.C. § 503(b), for "each violation or each day of a continuing violation" of 18 U.S.C. § 1464.

uttered in documentary). Nor would the spontaneity of the utterance be a defense. *Id.* at 2690-92 (violation found for failure to have a delaying technique to avoid such spontaneous expletives such as Cher's F-word). Of course, the Vermont station could invest in costly tape-delay equipment to protect itself against this kind of risk, but it would be hard to fault the manager of a tiny public radio station for concluding the game was not worth the candle. It is so much easier to "just say no."

More recently the issue surfaced in connection with a planned PBS telecast of the acclaimed stage production of "King Lear" starring Ian McKellen. A famous scene in the stage play has the mad king disrobe to display full frontal nudity. This prompted a question whether this scene can be included in the TV production given its planned 9 p.m. broadcast schedule. Responding to that question the head of PBS remarked that "it's what I think about it and what the FCC will allow." Lisa de Moraes, *Nude Developments at PBS? You'll Have to Stay Tuned*, Wash. Post, July 14, 2008, at C1. She did not reveal what she thought about it, but as to what the FCC will allow, who can say? Mindful of the FCC's recent ruling that a rear view of a nude woman is "titillating" and "shocking," *see "NYPD Blue,"* 23 FCC Rcd at 3168, this is not an idle question. One alternative for PBS would be to risk a bet that the FCC would distinguish between frontal nudity of an old man (McKellen is 69) and the rear nudity of a young woman, or perhaps to give a special

dispensation for Shakespearean drama.[16] But who knows? There is no way to know in advance, and one could not fairly blame PBS if it takes the easy way out and directs Mr. McKellen not to do "the full monty."

III. THE POLITICS OF INDECENCY REGULATION

The FCC's enforcement actions make it appear as if there has been some rampant growth in broadcast indecency, and indeed a casual inspection of the number of recorded public complaints might suggest as much.[17] The number of complaints is misleading, however, and the FCC's reference in the *Omnibus Order*, 21 FCC Rcd at 2665, to "hundreds of thousands of complaints between February 2002 and March 2005" is disingenuous. The FCC is fully aware that the overwhelming percentage of recent complaints target a handful of programs, and most of them are computer-generated electronic complaints

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[16] In *Pacifica*, this Court noted that the case did not involve an "Elizabethan telecast," *Pacifica*, 438 U.S. at 751, a hint perhaps that classical drama might warrant special standards. The FCC presumably would say, simply, that it is all a matter of "context" — meaning we will know it when we see it.

[17] In 2004, the number of complaints was reported to be just over 1.4 million, of which a large percentage was generated by an email campaign by Parents Television Council and other activist citizen groups. In 2005, the number of complaints fell to just over 233,000. In 2006, the number rose again, with just over 275,000 reported for the first quarter of 2006. *See Indecency Complaints and NALs: 1993-2006*, http://www.fcc.gov/eb/oip/ComplStatChart.pdf. The FCC's website does not show more recent statistics.

provided by activist groups such as the Parents Television Council.[18] In some cases the FCC's complaint count has even included duplicate complaints from the same person to different commissioners and staff as separate complaints. To further underscore the artificiality of the complaint process, the FCC has recently held that it will act on complaints even if the complainant does not claim to have watched or heard the program. *See "NYPD Blue,"* 23 FCC Rcd at 3156.[19] The Commission's policy of acting only on complaints has become so artificial that it naturally prompts the question, why does the FCC not simply turn the monitoring function over directly to the Parent's Television Council? The question has a simple answer: the FCC already has.[20]

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[18] This is fully documented in a study of indecency complaints by the Progress and Freedom Foundation. *See* Adam Thierer, *Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process, Progress on Point* no. 12.22, Nov. 2005, www.pff.org/issues-pubs/pops/pop12.22indecency enforcement.pdf. A Freedom of Information Act request by the Wall Street Journal revealed that of some 6500 complaints filed against an episode of "Without a Trace" (for which CBS and its affiliates drew record fines, 21 FCC Rcd 2732 (2006)), all but three of the complaints were computer-generated form letters provided by Parents Television Council. Amy Schatz, *Networks Fight Rising Number of FCC Fines*, Wall St. J., May 19, 2006, at B1.

[19] The FCC does require that it be shown that the programs were aired in the market from which the complaints emanate. *See Omnibus Remand Order*, 21 FCC Rcd at 13328-29.

[20] Parents Television Council has been in the front of the recent indecency campaign, but it is not alone. Other activists include

Adding to the influence of activist crusaders like the Parents Television Council, the FCC has also been influenced by congressional pressure. In 2003 and 2004, the Senate and House adopted resolutions that not only declared the FCC should be more vigorous in its enforcement of indecency but should specifically overrule its enforcement bureau's finding of no violation in the *Golden Globe Awards* case. S. Res. 283, 108th Cong. (2003); H.R. Res. 500, 108th Cong. (2004). The FCC responded, both in the *Golden Globe Awards* case and in this case. Shortly thereafter, Congress reaffirmed its desire for tougher enforcement by enacting the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491 (2006), *amending* 47 U.S.C. § 503(b), to authorize increased forfeiture penalties. It is quite unexceptional as a general matter for an agency to be responsive to congressional policy directives, but the agency must also conform its actions to the rule of law. The Act did not define any new standard of indecency or profanity. Moreover, neither the Act

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Morality in Media, American Family Association, American Decency Association, Family Research Council, Christian Coalition, and American Values — to give only a partial list. For many of these groups the indecency issue is part of a more general religious and moral agenda. *See, e.g.*, http://www.ouramericanvalues.org/about.php. (describing the group's purpose as "defending life, traditional marriage, and equipping our children with the values necessary to stand against liberal education and cultural forces"); *see also* Kimberly Zarkin, *Anti-Indecency Groups and the Federal Communications Commission: A Study in the Politics of Broadcast Regulation* 71-80 (2003) (describing American Family Association campaigns against programs that it deems to be pro-homosexuality, anti-family or anti-Christian).

nor the earlier resolutions of the House and Senate can constitutionally direct law enforcement policy. Elementary separation of powers principles forbid Congress from exercising executive (and especially prosecutorial) powers in this fashion. *See Bowsher v. Synar*, 478 U.S. 714 (1986). Finally, it should go without saying (but sometimes even the obvious bears repeating): Congress cannot insulate the indecency standard from First Amendment constraints.

The Government seeks to frame the issue simply as what must be shown for an agency to change its policy and within that framework what degree of deference should be shown agency policy-making judgments. Government Brief at 20-21. But the real issue here is not whether an agency is free to change its mind or whether it is entitled to some judicial deference in choosing among policy options: of course it is. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The core question is whether an agency is entitled to deference in regard to the permissible scope of content regulation under the First Amendment: of course it is not. Because the "rationality" of the agency's action here necessarily implicates this latter question, it calls for a strict scrutiny that precludes deference. Thus even accepting the Government's position that review should be limited to whether the FCC's change in policy is "arbitrary and capricious" under the standards of the Administrative Procedure Act, it is inappropriate to extend *State Farm* deference to the agency's action.

We acknowledge that in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195-96 (1997), this Court noted that Congress is entitled to deference in making legislative judgments even where they raise First Amendment issues. It compared that deference to the deference owed to administrative agencies, thereby implying that an agency empowered by Congress to make policy judgments was similarly entitled to deference. However, the deference given to Congress (and indirectly to the FCC) in *Turner* is irrelevant here. First, a majority of the Court held that *Turner* did not involve content-specific regulation calling for strict judicial scrutiny. This case unarguably does, and so puts the posture of judicial review in a completely different light: the Government bears the extremely heavy burden of proving both a compelling purpose and a least restrictive approach to satisfying that purpose. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000). Second, *Turner* involved difficult issues of economic predictions about the effects of various policy options, which find no counterpart here. On matters of direct content regulation that necessarily implicate the First Amendment, *even Congress* is not accorded deference. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989). It would be peculiar indeed to extend a form of deference to the FCC that not even Congress can command.

Even apart from the constitutional issue, there would be little basis for deference in this case. The usual argument for deference to agency policy-making judgments is that the agency has been delegated a degree of discretion based on its special

expertise. A determination of what constitutes indecency does not entail any such expertise; but even if it did, the FCC has not exercised any. It has simply capitulated to public clamor and political pressure. No expertise is involved in reading emails sent by angry viewers who want the FCC to act as surrogate parents. No expertise is required to understand a threat from a congressman (also responding to the same angry viewers). A.C. Nielsen (the premier agency for surveying television-viewing preferences) at least employs sophisticated sampling techniques to ascertain viewer preferences in a reasonable fashion. The FCC simply opens its email.

Indeed, as mentioned earlier, the agency does not even bother to insist that the complaints come from a person who has viewed or heard the program in question. It treats them as votes, not complaints. The distinction between complaining and voting is subtle but important. In the case of voting one merely records the expressed preference — for or against. It is irrelevant how the preference is formed — whether it reflects any deliberative thought or indeed whether it even reflects the true views of the voter on the matter at hand. By contrast, a complaint normally carries with it the assumption that the complainant at least has some individual grievance. As this Court has long recognized, there is an important difference between persons with an individual grievance on the one hand and a purely ideological interest on the other. *See, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 771 (1990). We do not argue that the FCC is bound to ignore ideological complainants altogether, but it should candidly acknowledge that its so-called "complaint" process is

being manipulated by ideological activist groups, rather than attempting to pass off artificially-hyped "complaints" as evidence of large-scale discontent.

In all events, the FCC must be reminded that even genuinely popular support for regulating indecency cannot confer authority on it to do so. The public has a right to complain; after all that is part of their First Amendment rights. But if the First Amendment means anything, it also means that the right to complain is not a license to deprive speakers of their right to speak or listeners/viewers of their right to hear or see the speaker's message.[21] It is no response to say that speakers or listeners/viewers are not deprived of their rights because the affected speech is not censored but simply moved to a different time in the broadcast day. Such "time zoning" necessarily affects the accessibility of the speech to audiences desiring to hear or view it, and this in turn affects the producer's decision whether it is worthwhile to produce it.

IV. THE COURT'S OPTIONS

The court below held that the FCC had failed to give a rational justification for its fleeting expletive policy. The Government now argues that this is purely a question of administrative procedure, one

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[21] While the First Amendment is formally directed at the right to speak, a corollary of that right is that others are permitted to hear (or view) the speech that might be suppressed by regulation. Thus, it is not only the rights of broadcasters or program producers that are at stake here, but also the rights of listeners and viewers.

that can be isolated from the First Amendment question which, it argues, should be remanded to the Second Circuit for further consideration. Government Brief at 20-22, 42-43. The Government asks this Court to engage in an artificially narrow reading of the lower court's decision. Notwithstanding that the lower court characterized its analysis of the First Amendment issue as "*dicta*," its analysis was an integral part of what made the FCC's new policy arbitrary and capricious. To isolate the court's treatment of administrative arbitrariness from the First Amendment issue that animated it is simply to turn a blind eye to the real controversy over indecency regulation. The Government's proposed course of action appears to be purely strategic, perhaps to give the agency a bit more time to pound the broadcast industry into submission. The question of constitutionality was fairly raised and fully argued below; it will not be changed by asking the Second Circuit to jump this hurdle again. The crucial point here is that the indecency policy approved by this Court in *Pacifica* is not the policy that the agency is now enforcing. That was the conclusion of the court below, and we think the Court should not now finesse the issue in order to permit a few more "i"s to be dotted and "t"s to be crossed.

But even if the Court accepts the Government's proposed approach and limits its review to the question of administrative rationality, we see no way to avoid the First Amendment implications of what the FCC is doing. The Government urges deference to the Commission's decision as if the standards of rational justification can stand independently of the fact that the policy is about how much speech can be

infringed in the name of protecting children against speech that offends. But judicial scrutiny of agency policies (or policy changes) affected by a constitutional interest is of a different order than scrutiny of those affected by a mere "public interest, convenience or necessity." The FCC routinely defends the constitutionality of its new policy by citing *Pacifica*. But neither as a matter of administrative rationality nor of constitutional authority does *Pacifica* provide any basis for deferring to the FCC's judgment for two reasons: one, the indecency policy that is now being enforced is not the policy that was before the Court in 1978; and two, this Court's First Amendment jurisprudence has evolved since 1978, as exemplified by *Sable Communications* (1989), *Playboy* (2000), and *ACLU v. Ashcroft*, 542 U.S. 656 (2004).

For both these reasons, we think *Pacifica* provides no defense for the Commission's radical new indecency policy, whether that policy is addressed in terms of administrative arbitrariness or the First Amendment. We believe, therefore, that, at a minimum, this Court should declare that the fleeting expletive policy is beyond the boundaries established in *Pacifica*. Further, at some point the Court must recognize that changes in both the electronic media and in First Amendment jurisprudence have altered the premises of *Pacifica* itself. This Court has previously acknowledged the need to account for changes in electronic media, because "solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)

(striking down restrictions on broadcaster's ability to refuse to carry political broadcasting). This observation was never more apt than it is today.

A central consideration underlying the Court's decision in *Pacifica* was that broadcasting was considered to be "uniquely pervasive." Whatever the accuracy of that label in 1978, it cannot be reasonably claimed today that broadcasting is uniquely pervasive. Today only 14% of television households rely on over-the-air programming from conventional broadcast stations; the rest subscribe either to cable or satellite — classified by the FCC as "multi-channel video program distributors" ("MVPD"). *FCC Public Release on 13th Annual Report on Video Competition*, p. 3, 2007 WL 4197270 (2007). Given the overwhelming reliance on MVPD, it is simply incoherent to treat broadcast programs as "uniquely pervasive." *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-45 (1996) (Breyer, J.) (plurality) (finding the pervasiveness factors cited in *Pacifica* applicable to cable television).[22]

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[22] In light of the broadcasting-is-different mantra it bears noting that the foremost technological feature that has been thought to make broadcasting different from other media — the use of scarce spectrum — was not part of the indecency doctrine in *Pacifica*. *See Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., dissenting) (noting that both the majority opinion by Justice Stevens and the concurring opinion by Justice Powell "rightly refrain from relying on the notion of 'spectrum scarcity' to support their result"). Whatever types of regulation may be justified by spectrum scarcity in today's age of electronic plenty, the regulation of indecency surely is not one of them. After all, the whole premise of indecency controls is "less is more."

In the Internet age the same observation holds for online viewing. The same programs that the FCC considers indecent when broadcast can be seen on YouTube. Indeed, because they are archived, they can be seen and seen again. No one knows how many children saw the 2003 Golden Globe award show when Bono exclaimed the F-word on receiving the award. But it is a fair guess that a larger number will see it on YouTube, where it has been archived since 2007. http://www.youtube.com/watch?v=COlPQlNguvU. Yet in *Reno v. ACLU*, 521 U.S. 844 (1997), the Court ruled that *Pacifica* could have no application to the Internet. Among other things, the Court in *Reno* reasoned that the Internet, unlike broadcasting, is not "invasive" and does not "appear on one's computer screen unbidden." *Id.* at 849.[23] The idea that broadcasting is specially invasive seems somewhat strained. It conjures up an image of hapless captives of the video monitor who are unable to defend themselves even with a remote

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[23] The relationship, if any, between the "invasiveness" factor cited in *Reno* and the "uniquely pervasive" factor cited in *Pacifica* is unclear. Apropos the latter, however, it should be emphasized that the Internet is far more pervasive today than it was in 1997. Perhaps more importantly, the emergence of video streaming has brought it much closer to broadcast television. Video streaming is especially popular with children. The most recent monthly viewing data from Nielsen Online shows that in June 2008 there were 8 million children age 2-11 who viewed an average of 51 streams and 118 minutes of online video per person per month, and 11.6 million teens who viewed an average of 74 streams and 132 minutes. The amount of viewing by each group exceeded that of the larger adult population of online viewers (75.1 million). *See* http://www.netratings.com/resources.jsp?section=btn_filter&nav=5.

control that can change channels faster than a speeding bullet.

Be that as it may, the surprise factor was effectively destroyed by *Playboy* because it is simply incredible to suppose that there is any greater surprise when a program arrives via shielded conduit than when it arrives over the air.[24] The same is true for Internet video. In 1997 it might have been plausible to suppose that children would not stumble upon offensive language or images online because most users searched for discrete content. In today's era of streaming video the element of surprise is as likely for online video as it is for broadcast video. Ultimately, the surprise argument is a non-starter in any event because the Commission no longer cares whether the viewer has prior notice. In its recent indecency decision involving ABC's "NYPD Blue," the Commission refused to give any weight to the fact that the program was preceded by a warning because it found the depiction of a woman's buttocks was "shocking and titillating." *"NYPD Blue,"* 23 FCC Rcd at 3168.

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[24] In the *Omnibus Remand Order*, 21 FCC Rcd at 13320, the Commission claimed that cable was different from broadcasting in that "parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children." The Commission ignores the fact that cable operators package channels in tiers, not individual channels (except for pay-per-view). More importantly cable channels are essentially like broadcast channels in presenting a mix of programming, so the viewer's options are essentially the same for both media.

The more salient point about the Internet-versus-broadcast comparison is the one made in *ACLU v. Ashcroft*. In upholding a preliminary injunction against enforcement of the Child Online Protection Act, 47 U.S.C. § 231(a) (1), the Court relied on the fact that blocking and filtering technology appeared to provide an effective and less restrictive alternative to the criminal sanctions the Act imposed; unless the Government could prove that this technology was inadequate, the Act was unconstitutional.[25] *Ashcroft*, 542 U.S. at 670; *see also Playboy Entm't*, 529 U.S. at 826.

Equivalent technology is available for television, such as the V-chip device. In its *Omnibus Remand Order*, 21 FCC Rcd at 3168-69, the FCC dismissed the V-chip as a solution to broadcast indecency on the ground that most television sets do not contain the device; parents are unaware of it or do not know how to use it; and in any event it will not work where the program is not accurately rated, or cannot be rated for unanticipated utterances. This cavalier dismissal of the V-chip device is stunning. What was the point of Congress's mandating the V-chip technology, 47 U.S.C. § 303(x), or the Commission's approval of an industry ratings system to work with that technology, *Video Programming Ratings*, 13 FCC Rcd 8232 (1998), if parents are to be told that

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[25] While the Court remanded for further hearings on that issue, on remand the lower court found that available filtering technology was an effective and less restrictive alternative. *See ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom. ACLU v. Mukasey*, _ F.3d _, 2008 WL 2801759 (3d Cir. July 22, 2008)

they do not need the V-chip and do not need to learn how to use it because the FCC will take care of the matter for them?[26] We concede that filtering devices like the V-chip are not a solution for all offensive-content cases, but that fact cannot excuse the FCC's complete indifference to self-help measures where they are available.

The debate over the efficacy of the V-chip device for broadcasting is a red herring in any event. Cable and satellite subscribers have long had access to the same "targeted" blocking technology that the Court cited in *Playboy* as a basis for finding an adequate, less restrictive alternative to governmental censorship. *See* 529 U.S. at 815. The effectiveness of such blocking technology will increase with the full deployment of digital technology, as the Court in *Playboy* also noted. *Id.* at 808. The 14% of broadcast signals that are not now delivered over cable or satellite will be increasingly served by digital sets where channels can be shown or hidden or can employ the V-chip. With such less restrictive means available to parents, the First Amendment does not allow the FCC to act as "Supernanny" for children

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[26] The Commission reports that most television viewers who have a V-chip device are either unaware of it or do not know how to use it. *Omnibus Remand Order*, 21 FCC Rcd at 13319-20. That fact would not distinguish them from the equal number of computer users who do not know how to install or operate the filtering software available for their computers, which this Court in *Ashcroft* found to be, potentially, a less restrictive alternative to government regulation. It is the *availability* of individualized filtering devices, not the *actual use* of them, that constitutes a less restrictive alternative. *See Ashcroft*, 542 U.S. at 669-70.

whose parents cannot be bothered with shouldering their proper burden.

CONCLUSION

In 1983, Ithiel de Sola Pool, a distinguished political scientist and student of communications law, described *Pacifica* as "legal time bomb" that would explode into "radical censorship." Ithiel de Sola Pool, *Technologies of Freedom* 134 (1983). Indecency regulation was then in its infancy, and the Commission's enforcement policy in the immediate aftermath of *Pacifica* seemed to render such predictions hyperbole. As it happened, Professor Pool was prescient, in ways that those of us who were involved in indecency regulation in its infancy did not appreciate at the time. This case is merely one example of what Pool predicted. With flags flying in pursuit of the new enemy of good taste in broadcasting, the FCC has aimed its guns at the broadcast industry and, echoing Commodore Perry in the Battle at Lake Erie in 1813, has announced, "we have met the enemy and he is ours." More accurately it might have echoed Pogo's twist on Perry's quip: "we have met the enemy and he is us."

We urge the Court to recognize that the fleeting expletive policy is beyond the pale of the very special and limited indecency doctrine this Court approved in *Pacifica*. This would be an important step towards rescuing the First Amendment from a runaway regulatory process. But it would be an incomplete step for three reasons.

First, merely eliminating the fleeting expletives policy would leave untouched the larger problem of

ascertaining offensiveness in "context." In the Commission's new indecency jurisprudence, "context" has become a talisman to ward off serious questions about the extreme subjectivity of the agency's determinations. The Commission's distinction between "Saving Private Ryan" on the one hand and "NYPD Blue" on the other has become the iconic example of this subjectivity: the FCC wants us to believe that the S-word is not indecent and profane when it is uttered by (fictional) soldiers but is when uttered by (fictional) police officers. This arbitrariness is repeated throughout the FCC's new case. One example tells it all: "bullshitter" is offensive but "dickhead" is not. The nearest precedent for this new "linguistic turn" is Lewis Carroll's Humpty-Dumpty.[27]

Second, the lines that may have once separated over-the-air broadcasting from the other electronic media where the Court has refused to allow indecency regulation have disappeared. Broadcasting is no longer unique, and it is time for the Court to bring its views of the electronic media into alignment with contemporary technological and social reality.

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[27] "'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less'

'The question is,' said Alice, 'whether you *can* make words mean different things.'

'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'"

Lewis Carroll, *Through the Looking-Glass* 94 (Random House 1946).

Third, the indecency controls that began as a limited tool for reining in a small number of provocative broadcast personalities and irresponsible licensees have become a rallying cry for a revival of Nineteenth Century Comstockery. As long as these controls are tolerated they will encourage new political pressures for content regulation. As former regulators we appreciate that the FCC is in an uncomfortable position, buffeted by the turbulent passions of anxious parents and threats from excited congressmen. But that is precisely why the matter must be taken out of the agency's hands entirely. The FCC has now made strong commitments to a program of expanded and more vigorous enforcement in response to political pressure. We do not expect that pressure to disappear whatever this Court's ruling, but a clear decision of unconstitutionality will at least have the salutary effect of removing the agency's discretion to respond to it.

For all the foregoing reasons, *amici curiae* Former FCC Commissioners and Officials request that this Court affirm the judgment of the Second Circuit.

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AMICUS CURIAE BRIEF

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No. 07-582

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2008

FEDERAL COMMUNICATIONS COMMISSION, et al.
Petitioners,

v.

FOX TELEVISION STATIONS, INC., et al.
Respondents.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE IN SUPPORT OF RESPONDENTS

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CONSENT TO FILE

Written consent to file in this matter was provided by all parties and is on file with the Clerk of this Court.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Media Institute is an independent, nonprofit research organization located in Arlington, Virginia. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry, and journalistic excellence. The Institute has participated as *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

STATEMENT OF THE CASE

This case pertains to an order of the Federal Communications Commission ("FCC") holding that music award programs broadcast by respondent were in violation of the indecency and profanity provisions of 18 U.S.C. § 1464 because of two unscripted expletives uttered by a celebrity in presenting an

award, and a spontaneous expletive uttered by an award winner in his acceptance speech. The United States Court of Appeals for the Second Circuit held that, because the FCC had previously held that fleeting, non-literal expletives did not constitute indecency, the order in question represented an arbitrary and capricious change in policy in violation of 5 U.S.C. § 706(2)(A) of the Administrative Procedure Act. This appeal followed.

SUMMARY OF ARGUMENT

Three basic principles should guide the disposition of this case, and amply warrant affirmance of the judgment of the Court of Appeals. First, the expression at issue here is fully protected by the First Amendment, since it falls under none of the exceptions this Court has recognized and

consistently applied in free speech and free press cases. Second, the standards which the Commission applied to these respondents far exceed the very limited scope of this Court's tolerance for regulation even in the special circumstances of licensed broadcasting. Third, all valid needs and interests of our society may be effectively protected by standards that comport with the rigorous safeguards of the First Amendment.

Beyond such issues of broadcasters' freedom of expression and its regulation, *amici curiae* fully share the concerns expressed by the Court of Appeals about the procedures by which the challenged standards were fashioned and applied. The Second Circuit's scathing criticism of the Commission's procedures, and of its inexplicable abandonment of seemingly settled regulatory standards, amply

warrant affirmance of the judgment below. Not only did the Commission dramatically and suddenly alter the standards by which it determined and regulated "indecent" material on the airwaves; the stated rationale for such a drastic revision of policy failed any possibly pertinent criteria and thus, as the Court of Appeals ruled, violated the agency's basic responsibilities under the Administrative Procedure Act. While the ruling below could be affirmed solely on such non-constitutional grounds, the lurking presence of several troubling First Amendment questions warrants the broader approach which the Court of Appeals adopted and which *amici curiae* urge in this brief.

I. THE EXPRESSION TARGETED BY THE CHALLENGED FCC ORDERS IS FULLY PROTECTED UNDER THE FIRST AMENDMENT.

As the Court of Appeals recognized, "all speech covered by the FCC's indecency policy is fully protected by the First Amendment." *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007) (citing *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989)). It was this vital premise that caused the Second Circuit to "question whether the FCC's indecency test can survive First Amendment scrutiny." *Fox Television*, 489 F.3d at 463. The Court of Appeals went on to observe that "the FCC's indecency test raises the separate constitutional question of whether it permits the FCC to sanction speech based on its subjective view of the merit of that speech." *Id.* at 464. While the court below had

no direct need to address the constitutional dimensions, such observations as the majority offered are most pertinent and merit amplification here.

This Court has never wavered from the view that all expression is presumptively protected by the First Amendment, save only where it falls within one of a small number of carefully defined exceptions, e.g., direct incitement to imminent lawless action, obscenity, and child pornography. Thus as Justice Harlan eloquently recognized in *Cohen v. California*, 403 U.S. 15, 24 (1971), even vulgar and widely offensive language may not be subject to governmental sanctions since "the constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." Memorable from the *Cohen* ruling were such maxims as "one man's vulgarity is [often] another's lyric" and the

premise that "words are often chosen as much for their emotive as their cognitive force." *Id.* at 25, 26. The Court also cautioned against "the facile assumption that one can forbid particular words without running a substantial risk of suppressing ideas in the process." *Id.* at 26. The Court of Appeals expressly invoked a closely related principle – this Court's deep distrust of any regulatory regime that permits a government agency to "sanction speech based on its subjective view of the merits of that speech." *Fox Television*, 489 F.3d at 464. Especially pertinent to the court below were such rulings as *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992), and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988). See *Fox Television*, 489 F.3d at 464. The relevance of these precedents was the unavoidable

recognition that the FCC actions challenged here are part of a regulatory scheme in which a government agency asserts and imposes substantial discretion in regard to the content of protected speech. As the Second Circuit observed, official actions of the type challenged here represent the exercise of precisely such governmental authority, and invite judicial concern for that, among other, reasons. *See id.* at 455-67.

While this Court has not directly revisited the status of vulgar or taboo language in any context such as that of the *Cohen* case, little doubt remains of the universal scope of *Cohen*'s protection for such unwelcome and uncivil language. The only possible exception to this doctrine arises in the unique context of licensed broadcasting, discussed in Part II below.

In recognizing so powerful a presumption of protection, our First Amendment and the cases applying it are nearly unique even among the most protective of legal systems, many of which compel the speaker to identify a rationale for protection rather than placing, as we do, the burden on government to demonstrate the basis for regulation. This Court recently recalled the centrality to our constitutional jurisprudence of that delicate but vital balance. In striking down one part of the Child Pornography Prevention Act, Justice Kennedy's majority opinion cautioned that "the Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

The FCC orders that are challenged here reveal both a deep distrust and a profound misunderstanding of this central premise of our First Amendment. Whatever might be the possible basis for regulation of broadcast material targeted as "indecent," the starting point of any analysis must be the presumption of constitutional protection, as much for that which offends and disgusts as that which pleases and delights. To invoke Justice Harlan's *Cohen* opinion once again: "most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . . to the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Cohen*, 403 U.S. at 24.

II. THE CHALLENGED ORDERS SUBSTANTIALLY EXCEED SPEECH RESTRICTIONS THIS COURT HAS SANCTIONED.

Whatever may be the technical differences among expressive media, they have never been held to justify substantially different levels of constitutional expression. From the outset, this Court and other courts have acknowledged such differences and their regulatory consequences. Most notably in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), a bare majority of this Court sustained a very limited use of the Commission's statutory authority to sanction the broadcasting by licensees of material that could be deemed "indecent." Not only did the Commission itself recognize the very limited nature of the authority it was seeking; two Justices whose concurrence was vital to the result expressly

cautioned that so narrow a ruling "does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered . . . here." *Id.* at 760-61 (Powell, J., concurring in part). Thereafter, Justice Powell's concurring assumption that "the Commission may be expected to proceed cautiously, as it has in the past" proved prophetic. *Id.* at 761 n.4 (Powell, J., concurring in part). Until quite recently, the FCC has in fact honored that expectation in its sparing view of the authority accorded by *Pacifica*. *See Fox Television*, 489 F.3d at 449-50.

Even more significant than the Commission's regulatory course has been this Court's steadily narrowing construction of the FCC's authority. Notably, in *Sable Communications*, 492 U.S. at 126,

this Court left no doubt that speech "which is indecent but not obscene is protected by the First Amendment" and may not be regulated in any context other than licensed broadcasting – specifically telephonic communications. *Id.* at 131. That view was forcefully reaffirmed in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822-23 (2000), with respect to cable broadcasting, and most notably with regard to the Internet in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). In *Reno*, Justice Stevens noted several vital limitations to the continuing force of *Pacifica* as precedent for regulating in any context. *Id.* at 867. First, he emphasized that *Pacifica* focused on a "specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when – rather than whether – it

would be permissible to air such a program in that particular medium." *Id.* Second, the Justice noted that *Pacifica* involved the non-punitive nature of the Commission order. *Id.* Finally, Justice Stevens emphasized that *Pacifica* involved the unique context of the medium of radio communications which "as a matter of history had 'received the most limited First Amendment protection . . . .'" *Id.* at 867 (quoting *Pacifica*, 438 U.S. at 748.)

Such rulings as these evidence this Court's growing discomfort with the continued vitality not only of *Pacifica* itself but of the anomalous status of licensed broadcasting under federal law. In *Denver Area Educational Telecommunications Consortium v. FCC*, Justice Thomas was joined by Justice Scalia and then-Chief Justice Rehnquist in observing that the current distinctions among media for First

Amendment purposes were "dubious from their infancy" and have created increasing anomalies for communications entities, most especially those engaged in cable broadcasting. 518 U.S. 727, 813 – 14 (1996) (Thomas, J., concurring in part and dissenting in part). Dramatic changes in technology and the very nature of communications only serve to heighten such concerns, and at the very least counsel caution in validating possibly outmoded assumptions about the very nature of the regulatory field. *See id.* at 776-77 (Souter, J., concurring).

Even more compelling in some respects has been the Commission's own (until very recently) extremely narrow view of the scope of its authority over arguably "indecent" broadcast material. *See Fox Television*, 489 F.3d at 451. Despite an occasional rebuke for having strayed beyond those bounds – the

"dial-a-porn" order invalidated in *Sable*, for example – it is notable that the other occasions which required this Court's intervention (to protect cable and the Internet) reflected the excessive zeal not of the Commission but rather of Congress. Consistent agency rulings during the quarter century that followed *Pacifica* amply validated Justice Powell's expectation that the Commission's enforcement of the indecency standard would be "restrained." *See Fox Television*, 489 F.3d at 448-51.

Specifically, as the Second Circuit observed, the FCC's own consistent view of salacious broadcasts clearly exempted from sanctions material that was not "patently offensive" and did not describe or depict "sexual or excretory organs or activities," and thus would clearly have exempted "fleeting expletives." *Id.* at 450; *see also Citizen's Complaint*

Against Pacifica Found. WBAI(FM), N.Y., N.Y., 56 F.C.C.2d 94, P 11 (1975). Nor was there any possible basis for the inclusion within the Commission's regulatory sights of broadcast material that was merely "profane" without the requisite elements of indecency; despite the presence of both terms in the statute as early as 1927, they had never previously been disjoined in this manner. *Fox Television*, 489 F.3d at 461-62. It was not until 2004 that the Commission departed significantly from what had been its consistent interpretation and application of this Court's *Pacifica* standard. *Fox Television*, 489 F.3d at 461; *see also Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19859 (2004) ("*Golden Globes II*"). The rationale for that departure evoked harsh criticism from the Second

Circuit as well as that court's deep concern for the absence of a defensible rationale for so profound a regulatory metamorphosis. *See Fox Television*, 489 F.3d at 461.

Finally, there seems little doubt that time and technology have undermined whatever logical support the *Pacifica* ruling might have merited three decades ago. As the dominant position of licensed broadcasting is steadily eroded by the ever–expanding options in television viewing–only 14% of American television households are limited to exclusively broadcast stations (*In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C.R. 2503, 2508 (2006))–the impact of licensed broadcasting's content on national mores and values diminishes correspondingly. Moreover, the always

tenuous assumption that licensed broadcasters were uniquely capable of inflicting harm on unwary young listeners and viewers has long since been undermined if not wholly repudiated. Meanwhile, it is worth recalling, as did the court below, the ominous prospects that led the Court of Appeals for the D.C. Circuit to reject on First Amendment grounds the *Pacifica* order. The claimed FCC authority, warned that court, would prohibit "the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible." *Fox Television*, 489 F.3d at 448 (quoting *Pacifica Found. v. FCC*, 556 F.2d 9, 14 (D.C. Cir. 1975)).

Although the continued vitality of *Pacifica* is not inescapably implicated in this case, that issue cannot long be postponed, and in the event of a reversal would become logically impossible to avoid. Surely the question whether *Pacifica* – arguably a defensible disposition in 1978 – is equally entitled to comparable deference in 2008 – merits this Court's close attention.

III. THE COMMISSION'S SUDDEN AND DRAMATIC CHANGE IN ITS REGULATORY STANDARDS FAILED IN CRITICAL RESPECTS TO MEET BASIC PRINCIPLES OF ADMINISTRATIVE LAW.

As the Court of Appeals recognized, the FCC's sharp and sudden reversal of policy regarding broadcast "indecency" failed to meet even rudimentary standards of administrative law. *Fox Television*, 489 F.3d at 455. For many years, the Commission had announced and applied a far more

tolerant standard in this sensitive area – one that comported fully with this Court's expectations in *Pacifica* that statutory authority over "indecent" material would be invoked sparingly. *Pacifica*, 438 U.S. at 750. Specifically, the FCC's well settled policy regarding alleged indecency demanded clear proof of such vital elements as that the charged material must be shown to be "patently offensive" and that it must "describe or depict sexual or excretory organs or activities." *Fox Television*, 489 F.3d at 451 (citing *Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C.* § 1464, 16 F.C.C.R. 7999 at PP 7 – 8 (2001)).

As late as 2001, the Commission recognized that "indecent speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it

may impose on indecent speech and choose the least restrictive means to further that interest." *Fox Television*, 489 F.3d at 451 (citing *Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C.R. 7999 at P 3. Accordingly, broadcast material such as "fleeting expletives" and evanescent images might have been offensive to many listeners and viewers, but clearly could not have been deemed "indecent" on that basis alone. Indeed, the consistency with which this standard reflected the Commission's view of salacious material in the quarter century following *Pacifica* was remarkable, and gave the broadcast industry ample assurance that only a certain category of carefully defined language or imagery could incur FCC sanctions. See *Fox Television*, 489 F.3d at 448-50.

The court below is not the only federal appellate court to take note of the FCC's remarkably consistent attitude toward fleeting material and indecency. In an even more recent decision, the 3rd Circuit engaged in a lengthy overview of the history of the FCC's approach to indecency and found that it had established "a consistent and entrenched policy of excluding fleeting broadcast material from the scope of actionable indecency." *CBS Corp. v. FCC*, No. 06-3575, slip op. at 24 (3d Cir. July 21, 2008) (*available at* www.ca3.uscourts.gov/opinarch/063574p.pdf). The industry's reliance on such a regulatory posture was amply justified and hardly surprising.

The alacrity with which that standard was abandoned was as striking as the distance that now separated the new policy from the old. In reversing

the Enforcement Bureau's ruling with respect to a single, isolated profanity on a national network broadcast, the Commission declared that any use on the air of certain vulgar and taboo words was now per se "patently offensive" and thus incurred legal sanctions regardless of context or any other hitherto relevant criteria. Quite simply, said the Commission of its long-standing and consistently affirmed standards for "indecency," "any such interpretation is no longer good law." *Fox Television,* 489 F.3d at 452 (citing *Golden Globes II*, 18 F.C.C.R. 19859 at P 12 (2004)).

Even more remarkable than the speed and the import of such a change in policy was the absence of any credible or probative rationale. As the Court of Appeals recognized after a careful review of the asserted regulatory interests, "the Remand Order

provides no reasoned analysis of the purported 'problem' it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable." *Id.* at 461. Indeed, such modest desiderata as could be identified in the Commission's new policy and enforcement rulings seemed to the Court of Appeals either lacking in credibility or logically unrelated to the asserted regulatory interests. The more deeply the Court of Appeals probed the FCC's stated rationale for the dramatic shift in regulatory policy, the less satisfying and convincing became the asserted justifications. Thus the Second Circuit's conclusion that "the FCC's new indecency regime . . . is invalid under the Administrative Procedure Act" was amply warranted and fully justified the court's action. *See id.* at 462.

Although not an issue directly before this Court, the Commission's handling of "profanity" provides a corollary to the metamorphosis of "indecency" in demonstrating the Commission's disregard for the limiting principles of *Pacifica*. Although the agency has since 1927 had statutory authority to regulate material that was "profane" as well as that which was "obscene" or "indecent," the Second Circuit correctly noted that "prior to 2004, the Commission never attempted to regulate 'profane' speech." *Fox Television*, 489 F.3d at 461, 466. Any references to "profanity" occurred solely in the context of what was either "obscene" or "indecent." *See id.* at 467. Commission rulings consistently declared that "profanity that does not fall under one of the above two categories [indecent or obscene] is fully protected by the First Amendment and cannot be regulated."

Id. at 462 (quoting *FCC, The Public and Broadcasting*, 1999 WL 391297 (June 1999)).

While this Court has never had occasion to address that issue, the clear import of *Pacifica*'s very limited approval of regulatory authority over "indecency" is that any assertion of agency power over profanity that is neither indecent nor obscene would be wholly unwarranted and clearly unconstitutional. Thus quite apart from the way in which "indecency" has been summarily redefined, the Commission's concurrent assertion of a wholly novel regulatory power over non-indecent profanity merits separate and deep concern not only among broadcasters but among all those who are concerned about freedom of expression.

The procedural flaws on which the Court of Appeals primarily relied are substantial and amply

warrant the conclusion that court reached. They are, however, closely related to the First Amendment issues which that court also felt deserving of attention, and to which it devoted a substantial portion of its opinion. *Amici* urge this Court to recognize that very nexus as it reviews the judgment of the Second Circuit.

IV. VITAL NATIONAL INTERESTS IN BROADCAST CONTENT MAY BE ADEQUATELY PROTECTED IN WAYS THAT ARE CONSISTENT WITH FIRST AMENDMENT SAFEGUARDS.

Certain technical differences among communications media may warrant contrasting regulatory approaches. Thus, for example, a ban on the broadcast of material that is found to be legally obscene or to contain child pornography seems beyond challenge, assuming that administrative enforcement procedures adequately ensure due

process – even though such actions may not (and logically cannot) duplicate all the procedures of a court in a criminal prosecution. Additionally, broadcasters may be required to document certain activities, including the content of material that airs on radio and television.

Viewer and listener interests may be, and are, protected in other ways that may be distinctive to the electronic media, but are also compatible with First Amendment safeguards. Notably, this Court's ruling in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), recognized the appropriateness of measures Congress had adopted to empower cable subscribers to determine the content of material which they received, and to block certain material that families might choose not to receive. Analogous possibilities deserve

consideration in this area, although particular technologies are clearly not appropriate for detailed discussion here.

In these and other ways, such national interests as merit protection by federal agencies may receive such deference consistent with the rigorous requirements of the First Amendment.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to affirm the judgment of the Court of Appeals and to remand for further proceedings.

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AMICUS CURIAE BRIEF

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Petitioners,

v.

FOX TELEVISION STATIONS, INC., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF BROADCASTERS AND RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

National Association of Broadcasters ("NAB") is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry, advocating on behalf of more than 8,300 local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, and the courts. NAB and its members have serious concerns about the Federal Communications Commission's broad new indecency policy, including its policy on "fleeting expletives," which reverses years of a more considered and restrained approach that showed greater sensitivity to the free speech interests of broadcasters around the country. In particular, NAB is concerned that the arbitrary and standardless application of the Commissions' new policy on fleeting expletives has had and will continue to have a dramatic nationwide chilling effect on broadcast content that is not actually indecent.

The Radio-Television News Directors Association ("RTNDA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, nor did any party, any counsel for a party, nor any person other than *amici*, their non-party members, or their counsel make a monetary contribution intending to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTNDA is committed to encouraging excellence in electronic journalism, and upholding First Amendment freedoms.

SUMMARY OF ARGUMENT

NAB and RTNDA submit this brief to bring to the Court's attention the fact that the Federal Communications Commission's reversal of its indecency policy on fleeting expletives has resulted in the arbitrary, inconsistent, and standardless censorship of broadcast programming based on the Commission's content-based view of its merit. This stark departure from the Commission's prior, more restrained approach has had a palpable chilling effect on broadcasting around the country.

As demonstrated in this brief, the Commission's decisions in several recent cases finding even single utterances of certain words actionably indecent have resulted in the arbitrary suppression of broadcast content. The Commission purports to rely on "context" in making its indecency determinations, but in reality the way that the Commission considers "context" amounts to a standardless – and unpredictable – assessment of what programming it favors and disfavors.

The Commission's own actions have compounded the harmful effects of its new indecency policy. The Commission has delayed adjudication or reconsideration of several prominent indecency orders for years on end, and has already reversed

itself in one key indecency decision applying the new policy. Indeed, as noted by the Second Circuit in this case, the Commission declined to act on petitions for reconsideration of the very order that adopted the indecency policy. The Commission's actions not only suggest that the agency is attempting to shield its new indecency determinations from judicial review, but also belie the Commission's argument that it is applying anything approaching clear standards in its indecency decisions.

Moreover, while the Commission manipulates its litigation position, the effect of the arbitrary enforcement on the actual content produced and broadcast is immense. Local broadcasters have repeatedly erred on the side of self-censorship when making decisions to broadcast certain content – even in one case when the content was found not to be indecent by the Commission. The chilling effect falls substantially on local broadcasters without the financial resources to cope either with potential indecency fines or with the practical costs of the Commission's *ad hoc* indecency policy. Certain broadcasters have been strong-armed into consent decrees that mandate substantial self-censorship even when there is only a *preliminary* suggestion that indecent material may have been broadcast. And the Commission has used its self-created backlog of indecency complaints to place substantial burdens on broadcasters in the Commission's license renewal and assignment processes.

The Commission's inconsistent, arbitrary, and standardless enforcement of its new indecency policy

is contrary to the First Amendment. The Commission has failed to follow any clear and predictable standards that would limit its discretion, and appears to be acting arbitrarily to encourage some content or views and discourage others in enforcing its indecency regulations. The case before the Court is but the tip of the iceberg. Even putting aside the Commission's efforts to crack down on certain images that have landed it back before the Second Circuit in another case,[2] the Commission's new indecency policy on fleeting expletives is trampling on substantial free speech interests.

ARGUMENT

I. THE COMMISSION IS WIELDING ITS NARROW POWER TO REGULATE BROADCAST INDECENCY TO CENSOR PROGRAMMING ARBITRARILY BASED ON SUBJECT MATTER.

The Commission has thrown open the door to arbitrary application of its indecency regulations by reversing its previous policy on expletives enforced for over two decades. In the wake of this Court's decision in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the Commission hewed to a relatively narrow indecency enforcement policy that, while purporting to consider the "context" of potentially indecent content, recognized in its enforcement actions the narrowness of the Court's *Pacifica* holding that the

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[2] *See In re Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broadcast of the Program "NYPD Blue,"* 23 F.C.C.R. 3147 (2008).

"verbal shock treatment" of George Carlin's monologue was indecent. *Id.* at 757 (Powell, J., concurring). But in its order regarding the 2003 broadcast of the Golden Globe Awards, the Commission, reversing the holding of its own Enforcement Bureau, abandoned any such self-restraint by making two complementary findings: that the word "fuck" always has a sexual meaning that places it within the ambit of the Commission's indecency regulations, and that even "fleeting expletives" that are not repeated may be found to be actionably indecent. *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the 'Golden Globes Award' Program*, 19 F.C.C.R. 4975, ¶¶ 8, 12 (2004) ("*Golden Globe Awards Order*").

While the *Golden Globe Awards Order* might have been read as creating a *per se* rule that any broadcast use of the word "fuck" (or any other word viewed by the Commission "as highly offensive," *id.* ¶ 14) outside the Commission's "safe harbor" period was actionably indecent, in practice it has served to dramatically enlarge the Commission's discretion to decide when to apply its indecency policy. And the Commission has already abused that discretion to apply its policy in a standardless and arbitrary way.[3]

1. The facts surrounding the 2003 broadcast of the Golden Globe Awards illustrate the extent to

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[3] In the *Golden Globes Award Order*, the Commission also adopted a new policy on "profane" language that so far has paralleled the enforcement of its policy on "indecent" language. For purposes of this brief, the references to the Commission's indecency policy include the new policy regarding profanity.

which the Commission has dramatically expanded the range of content that it may consider to be actionably indecent. In that case, the singer Bono said, in unscripted remarks, "This is really, really fucking brilliant." *Golden Globe Awards Order* ¶ 3, n.4. In reversing the Enforcement Bureau decision and finding the broadcast actionably indecent, the Commission acknowledged that the single utterance of the word "fucking" did not have a literal meaning – as the Commission recognized, it was used as an "intensifier" – although the Commission concluded that the word "inherently has a sexual connotation." *Id.* ¶ 8; *but cf. Cohen v. California*, 403 U.S. 15, 20 (1971) (noting use of same word in that case "cannot plausibly" be characterized as erotic). Nor did the Commission place weight on whether the use of the word was scripted or took place on live television: "[t]he fact that the use of this word may have been unintentional is irrelevant." *Golden Globe Awards Order* ¶ 9. Besides, the Commission noted, the broadcasters were on notice that a different performer (Cher) had used an expletive on a live broadcast of a different show the year before, and Bono had allegedly used the word on a live broadcast of yet another awards show nine years before. *Id.* ¶ 10. The Commission also pointed to "technological advances" that would have allowed blocking of single words during the broadcast. *Id.* ¶ 11.

The fact that a single, unscripted, non-literal utterance of the word "fucking" on live television could be considered indecent meant either (1) that the Commission would enforce a broad *per se* rule that broadcast of even fleeting uses of that word or

its derivations would be considered indecent, or (2) that the Commission was prepared to embark on a case-by-case evaluation of any utterance of that word or other expletives outside the safe-harbor period.[4] As NBC noted in its still-pending motion for partial reconsideration, the holding would necessarily have a chilling effect on broadcasters who must "play it safe" if such fleeting words could be considered actionably indecent. *See* NBC Petition for Partial Reconsideration, No. EB-03-IH-0110, at 3-5 (FCC filed Apr. 19, 2004)[5] But for years after that Petition was filed, the Commission never ruled on it, even as the Commission moved on to apply and even expand its policy change announced in the *Golden Globe Awards Order* on a case-by-case basis.

In the *Golden Globe Awards Order* itself, the Commission provided scant "contextual" guidance as to when the Commission would or would not consider utterance of the word "fucking" (or other "highly offensive" words) to be actionably indecent. The agency stated in a conclusory fashion that the use of the word "here, on a nationally telecast awards ceremony, was shocking and gratuitous," and noted

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[4] The Commission provides a "safe harbor" between 10 p.m. and 6 a.m. in which its regulations do not forbid the broadcast of indecent material. 47 C.F.R. § 73.3999(b); *see Action for Children's Television v. FCC*, 58 F.3d 654, 669-70 (D.C. Cir. 1995) (en banc) (holding that Commission is required to limit its restrictions on the broadcast of indecent programming to the period from 6:00 a.m. to 10:00 p.m.).

[5] This and other briefs regarding reconsideration of the *Golden Globe Awards Order* are *available at* http://www.fcc.gov/eb/broadcast/Plead.html.

that NBC had not claimed any "independent value of use of the word here, or any other factors to mitigate its offensiveness." *Golden Globe Awards Order* ¶ 9. But what context would render not indecent the use of a word that the Commission determined to be "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language"? *Id.*. Is it more shocking and gratuitous that the language is used on an awards show rather than a program designed for political discussion? What if a public figure is making a political argument on an awards show or other live programming? How does a broadcaster determine if an expletive adds "independent value" or is not "gratuitous" even if uttered in what the Commission considers to be an approved context?

2. The Commission's subsequent decisions in the years following the *Golden Globe Awards Order* have charted an arbitrary and unpredictable course in haltingly attempting to answer such questions, leaving broadcasters all the more uncertain about what is permissible. The Commission has determined that expletives uttered by actors depicting soldiers in the heat of battle are not indecent, but expletives uttered by actual blues producers and hip-hop artists in a documentary are indecent. It has also ruled that expletives uttered by entertainers at live awards shows are indecent, but expletives uttered by entertainers on programs that feature news content are not indecent. Though couched in application of vague contextual standards, the Commission's terse analyses have been nothing more than a fig leaf for arbitrarily

suppressing certain programming based on its approval or disapproval of the broadcast content itself.

A clear example of the Commission's preference for certain programming is its finding that an unedited broadcast of the film "Saving Private Ryan" containing repeated expletives is not actionably indecent. *In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507 (2005) ("*Saving Private Ryan Order*").

"Saving Private Ryan" contains numerous utterances of derivations of "fuck" and "shit." *Id.* ¶ 4. However, the Commission did not find the broadcast actionably indecent for a number of reasons – most of them centered on approval of the content in the film itself or of the speakers portrayed in the film. In its Order, the Commission noted that it has found "similar material depicting an historical view of World War II and wartime atrocities [*Schindler's List*] to be not patently offensive, and thus not actionably indecent." *Id.* ¶ 16. And it approved of the expletives as "reflect[ing] the soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves." *Id.* ¶ 14. It found that depictions of these expletive-filled "reactions" to be "[e]ssential to the ability of the filmmaker to convey to viewers the extraordinary conditions in which the soldiers conducted themselves with courage and skill," and "integral to the film's objective of conveying the

horrors of war through the eyes of these soldiers, ordinary Americans placed in extraordinary situations." *Id.* Blocking the expletives in the broadcast would only "alter the nature of the artistic work and diminish the power, realism and immediacy of the film experience for viewers." *Id.*

These reasons boil down to little more than an *ad hoc* determination that the Commission approves of the subject matter of the broadcast and the speakers portrayed in it. The Commission believes that depicting "an historical view of World War II," at least where the "courage and skill" of American soldiers is conveyed, justifies broadcasting expletives, and that expletives are warranted when uttered by "soldiers, ordinary Americans placed in extraordinary situations." But these are not predictable, standard-driven determinations – these are subjective and outcome-driven conclusions.

The holding in the *Saving Private Ryan Order* is in stark contrast to the Commission's finding that expletives spoken by interviewees in a documentary by an Academy Award-winning director are actionably indecent. *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, ¶¶ 72-86 (2006) ("*Omnibus Order*"), *vacated in part on other grounds*, 21 F.C.C.R. 13,299 (2006). In the portion of the *Omnibus Order* not later vacated by the Commission, the Commission held that San Mateo County Community College District's broadcast of the documentary "The Blues: Godfathers and Sons" on its noncommercial educational station was

actionably indecent and issued a Notice of Apparent Liability for Forfeiture. That documentary contains interviews of blues performers, a record producer, and other individuals in which the interviewees use "fuck," "shit," and their derivatives. Over two years later, the Commission has yet to rule on the opposition to the Notice of Apparent Liability – insulating the decision from judicial review while broadcasters must attempt to deal with its precedential effect.

In its decision on "The Blues," the Commission dismissed the broadcaster's argument that the expletives were left in "so that the viewpoints of those being interviewed would be accurately reflected." *Id.* ¶ 77. While conceding that the expletives "may have had some communicative purpose," the Commission believed that the broadcaster could not show that they were "essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance, or that the substitution of other language would have materially altered the nature of the work." *Id.* ¶ 82. The Commission contrasted this with "Saving Private Ryan," where, it determined, the "nature of the artistic work" would have been altered by substituting other language for expletives. *Id.* In short, the "[educational] purpose could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." *Id.*

Not only was the "nature of the artistic work" considered in determining whether use of the expletives was justified, but the Commission also

explicitly pointed to the relevance of the identity of the speaker. The agency noted that "many of the expletives in the broadcast are not used by blues performers," but rather by "a former label owner and record producer" and "hip-hop artists" – suggesting that expletives by some speakers but not others in the *same program* may be acceptable. *Id.* ¶ 77.

These sorts of fine-toothed editorial judgments by a government agency pose no end of problems. The general rule outside the broadcasting context, of course, is that the government may not prohibit individuals from publicly uttering expletives in an effort to "excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse." *Cohen*, 403 U.S. at 22. Putting aside whether or not the agency has the requisite competence to make these sorts of editorial determinations in any context, the Commission's approach is fundamentally unpredictable. How do broadcasters determine in advance what is essential to the "nature of the artistic work"? Do some works have a "nature" or "purpose" to which expletives are essential – such as depictions of war? How can a broadcaster determine whether certain speakers are sufficiently central to the work that their expletives are not indecent?

In the same *Omnibus Order*, the Commission created even more uncertainty in its indecency policy in its treatment of a fleeting expletive – a single usage of the word "bullshitter" – uttered by a "Survivor:Vanuatu" contestant on the CBS program "The Early Show," finding a violation of its indecency regulations without even allowing CBS to present its

position. *See In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13,299, ¶ 9 (2006) ("*Remand Order*"). In the portion of the *Omnibus Order* addressing "The Early Show," after reiterating that the word "shit" always has an excretory connotation and that even fleeting expletives may be actionably indecent, the Commission reasoned that what was "most important to [its] analysis in this specific context" was that "use of the 'S-Word,' particularly during a morning news interview, is shocking and gratuitous." *Omnibus Order* ¶ 141.

Only after CBS appealed to the Second Circuit did the Commission reverse course – suddenly agreeing that CBS should be heard before a new "final" decision would be issued by the Commission and asking for a voluntary remand from the Second Circuit. *Remand Order* ¶ 9. On this limited remand, the Commission concluded that what had been the "most important" factor in making its indecency determination was in fact exculpatory. Rather than the expletive being *more* shocking because it was on a news show, the expletive was *less* offensive for this reason. Saying it was loathe to question the "editorial judgment" in "news programming" or "public affairs programming," the Commission now found the expletive not to be actionably indecent for the *sole reason* that it took place during "news programming." *Id.* ¶¶ 70-71, 73.

While seemingly intended to acknowledge the particular constitutional sensitivities raised in the context of news programming, the Commission's

reversal only creates more uncertainty and further dramatizes the arbitrary approach to enforcement that the Commission has taken. As the Commission itself noted, the interview of a reality show contestant was a separate segment arguably designed to promote CBS's own entertainment programming, though other segments of the same "Early Show" program dealt with political and foreign affairs topics. *Id.* ¶ 72. But rather than scrutinize this point itself, the Commission decided "in these circumstances to defer to CBS's plausible characterization of its own programming." *Id.* Thus again, the scope of the Commission's holding remains unclear. Are expletives spoken by entertainment figures on a news program always not indecent? Would the Commission defer to a broadcaster's characterization about a public affairs program? How about an entertainment news program? Does sports programming fall under the news umbrella? Where broadcasters have reason to believe that there is some risk that expletives may be broadcast, such as during live news coverage of a volatile situation, will the Commission find them strictly liable, regardless of the "news" context? And beyond muddying the indecency waters further, the Commission's "Early Show" reversal implies that it is necessary and appropriate for the Commission to make determinations as to what is or is not "news," a role that runs counter to the First Amendment.

Moreover, the reversal makes clear that there is no coherent rationale for the Commission's decisionmaking. The Commission was hardly unaware that "The Early Show" was a news program

when it released the *Omnibus Order* – indeed, it found the use of an expletive by a show contestant "particularly during a morning news interview" to be critical to its indecency determination. *Omnibus Order* ¶ 141. The Commission simply turned on a dime.

Finally, the portions of the *Remand Order* dealing with the 2002 and 2003 Billboard Music Awards, discussed at greater length by respondents, apply the same sort of arbitrary and standardless analysis. The original *Omnibus Order* contained little more than conclusory analysis that the use of the word "fuck" in the context of an awards program was indecent because it was shocking and gratuitous. *Omnibus Order* ¶¶ 105-106, 117, 120. Only when the cases went to the Second Circuit did the Commission decide that it should consider the broadcasters' objections and attempt to provide a more detailed explanation of its "contextual" analysis. But the added legal arguments pitched to the Second Circuit in the *Remand Order* provide no more guidance about the contexts in which use of expletives will or will not be punished, other than when uttered by entertainers on award shows. The Commission in its *Remand Order* only confirms that the "contemporary community standards" it is employing are based on the Commission's "collective experience and knowledge." *Remand Order* ¶ 28 (quoting *Infinity Radio License, Inc.*, 19 F.C.C.R. 5022, ¶ 12 (2004)). That is the opposite of a transparent and predictable standard.

3. The Commission has compounded the uncertainty created by its arbitrary and standardless policy by continuing to shield its orders from meaningful judicial review by refusing to make them final. This strategy imposes a substantial cost on broadcasters, who have been left with considerable uncertainty about what speech is indecent for years on end without an effective means of challenging the Commission's decisions.

Most remarkably, as noted above, the Commission refused for years to rule on the petition for partial reconsideration submitted in response to the *Golden Globe Awards Order*, even as the Commission *continued to apply and even expand the policy announced in that Order in subsequent cases.* But while delaying final resolution of the *Golden Globe Awards Order*, the Commission proceeded apace with the Billboard Music Awards decisions in the *Remand Order* – which it evidently believes to have better facts and to raise narrower issues than the *Golden Globe Awards Order*. *E.g.*, *Remand Order* ¶ 27 (regarding Nicole Ritchie's language: "This is not a case involving a single, spontaneously uttered expletive."); *id.* ¶ 62 (suggesting in the case of the 2002 awards that the offensiveness was "compounded" by what the Commission considered to be "inadequate and misleading" warnings).

Moreover, in the *Remand Order* itself, the Commission engaged in obvious manipulation to get its favored holdings before the Second Circuit. As explained above, the Commission performed a complete, largely unexplained about-face on a

fleeting expletive on "The Early Show," first holding that its placement in a morning news program made it particularly shocking, then reversing course and holding that its placement within a news program exculpated it from an indecency finding. *Supra* at 12-15.

The Commission similarly played procedural games with its indecency determinations regarding various episodes of the dramatic program "NYPD Blue." In the *Omnibus Order*, the Commission found various uses of the word "bullshit" to be actionably indecent, dismissing the broadcasters' argument that use of the word "was necessary for dramatic effect." *Omnibus Order* ¶ 130. That holding is in tension, to say the least, with the *Saving Private Ryan Order*, where dramatic effect that the Commission considered to be essential to the artistic work was held to justify the repeated use of expletives.[6] But in

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[6] For example, why is use of expletives in depicting life-and-death police activities considered indecent when the same expletives are not considered indecent in "Saving Private Ryan"? How does the Commission decide what situations are sufficiently violent that the use of expletives in response is justified? In the course of its profanity analysis of "NYPD Blue," the Commission provided its view that while "the expletives may have made some contribution to the authentic feel of the program, we believe that purpose could have been fulfilled and all viewpoints expressed without the broadcast of expletives." *Omnibus Order* ¶ 134. Again, how the Commission determines the "authentic feel" of the program is left unexplained – indeed, it is a textbook example of a subjective standard that can only be arbitrarily applied, even assuming a government agency can ever make such artistic and editorial judgments consistent with the First Amendment.

the *Remand Order*, the Commission vacated this holding on a technicality involving the location of the person submitting the complaint – suggesting that it will likely reach a similar holding in future cases, but without permitting timely review of its decision by the Second Circuit or this Court.

Further, as noted above, the Commission has still failed to act on oppositions to the Notice of Apparent Liability regarding the broadcast of "The Blues," though its decision is more than two years old, and the Commission has subsequently acted on other portions of the *Omnibus Order* – those that it was forced to defend on appeal. Nor is this pattern of delay limited to the expletive context – the Commission has failed to act on oppositions to a contested Notice of Apparent Liability for broadcast of an episode of "Without a Trace" containing depictions of teenage sexual conduct but no nudity. *See In re Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broadcast of the Program "Without a Trace,"* 21 F.C.C.R. 2732, ¶ 15 (2006) (suggesting that depictions "[went] well beyond what the story line could reasonably be said to require"), *cancelled in part*, 21 F.C.C.R. 3110 (2006). These delays leave the NAL decisions effectively precedential, creating more uncertainty in the standards the Commission is applying, without permitting timely review.

It is also noteworthy that the Commission's evasion tactics in the "fleeting expletives" cases mirror those in its recent "fleeting images" cases. As the Third Circuit has noted, the question of whether

"fleeting images" are actionably indecent has historically been analyzed under the general rubric of the Commission's policy on "fleeting material." *CBS Corp. v. FCC*, No. 06-3575, __ F.3d __, 2008 WL 2789307, at *13 (3d Cir. July 21, 2008). But in the Commission's haste to act on the split-second "wardrobe malfunction" during the Super Bowl XXXVIII Halftime Show, it arbitrarily and capriciously reversed course on its prior "fleeting material" policy – creating the same kind of uncertainty as to what programming would be actionably indecent. *Id.* at *16. The Commission then compounded the problem by taking the implausible litigation position that there had been no policy change regarding "fleeting images" at all – a "strained argument[]" contrary to "extensive precedent over thirty years of indecency enforcement." *Id.* at *15-*16. Here again, the Commission has brushed aside clarity and predictability in its indecency policy in a way that substantially prejudices broadcasters.

Thus, the Commission's actions and inactions have insulated its recent indecency holdings from meaningful judicial review, while forcing broadcasters to attempt to comply with a constantly shifting indecency policy. Broadcasters have been left without any recourse to respond to the multitude of issues raised by the Commission's essentially standardless application of its new indecency policy.

II. THE ARBITRARY ENFORCEMENT OF THE COMMISSION'S NEW INDECENCY POLICY HAS A SUBSTANTIAL CHILLING EFFECT ON BROADCASTERS.

The Commission's arbitrary application of its indecency policy, and its apparent strategy of shielding decisions from judicial review, have had and will continue to have substantial chilling effects on broadcasters nationwide. Broadcasters have nothing approaching clear guidance as to what content the Commission will deem to be indecent. Particularly in the case of live broadcasts, they face potential liability for utterances likely beyond their control, though without clear standards as to when they will be penalized. The result of this is unfortunately predictable: broadcasters have resorted to self-censorship of non-indecent content and will continue to do so.

1. There is clear evidence that the ambiguity of the Commission's new enforcement regime has resulted directly in excessive self-censorship. Most strikingly, on the heels of the release of the *Golden Globe Awards Order*, approximately 66 out of a total of 225 ABC affiliate stations declined to air the November 11, 2004 network broadcast of "Saving Private Ryan" due to uncertainty about whether it would be found indecent under the Commission's revised indecency policy – notwithstanding prior Enforcement Bureau rulings under the old policy that previous broadcasts of unedited version of the film did not violate indecency regulations. *Saving Private Ryan Order* ¶ 4. There could hardly be a

clearer example of self-censorship of non-indecent content directly attributable to the Commission's abrupt change in policy. The Commission did not help matters, reportedly refusing to provide much-needed advance guidance as to whether the broadcast would be considered indecent – no doubt to avoid the appearance of prior restraint as a government agency screening certain content in advance of its broadcast.[7] *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (prior restraints bear "heavy presumption" against constitutionality).

Other examples of self-censorship abound. Broadcasters have refused to air or delayed broadcast of a Peabody Award-winning documentary on the September 11 attacks.[8] More than 80 percent of PBS affiliates decided to air only a censored version of a documentary on the Iraq War.[9] A

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[7] *See* Allison Romano, *Reporting Live. Very Carefully*, Broadcasting & Cable, July 4, 2005. As an ABC affiliate president in Des Moines, Iowa noted, "We regret that we are not able to broadcast a patriotic, artistic tribute to our fighting forces like 'Saving Private Ryan.' . . . Can a movie with an 'M' rating, however prestigious the production or poignant the subject matter, be shown before 10 p.m.? . . . With the current FCC, we just don't know." Richard Huff, *Fear Over "Private" Parts*, N.Y. Daily News, Nov. 11, 2004, at 111.

[8] Lili Levi, First Amendment Center, *The FCC's Regulation of Indecency*, at 32 (Apr. 2008); J.A. 251.

[9] Levi, *The FCC's Regulation of Indecency*, at 33; Louis Wiley, *Why 'Frontline' Used Bad Language*, Broadcasting & Cable, Feb. 28, 2005, *available at* www.broadcastingcable.com/article/CA506958.html; J.A. 252.

number of broadcasters censored or delayed showing the Ken Burns World War II documentary "The War" due to concerns about four expletives in a fourteen-hour film series.[10] And in 2006, a Vermont public-radio station forbade a legislative candidate from participating in a broadcast debate because he had previously referred to two students as "shits" and it wanted to avoid exposure to a fine.[11]

The censorial effects of the Commission's actions have also reached broadcast newsrooms. Broadcast journalists historically have exercised reasonable judgment, acting with responsibility and sensitivity to the public's needs and tastes in their newscasts. In those instances where it has been the broadcaster's judgment that depicting epithets or including vulgar or coarse language is integral to a story, the Commission's long-standing policy has been to defer to that editorial discretion.[12] Under established Commission precedent, broadcast journalists were free to exercise independent

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[10] Dick Kreck, *KRMA Cautious About Time Slot for Burns' WWII Epic*, Denver Post, Nov. 10, 2006, at FF-17; Joe Garofoli, *"Howl" Too Hot to Hear*, San Francisco Chron., Oct. 3, 2007, at A1.

[11] Levi, *The FCC's Regulation of Indecency*, at 33.

[12] *Letter to Peter Branton*, 6 F.C.C.R. 610 (1991) (subsequent history omitted) (Complaint filed against National Public Radio for broadcast in which organized crime figure John Gotti used the work "fuck" ten times in seven sentences dismissed because of FCC's reluctance to intervene in the editorial judgments of broadcast licensees); *see also In re Jack Straw Memorial Found. for Renewal of License of Station KRAB-FM, Seattle, Washington*, 29 F.C.C.2d 334 (1971).

judgment about how stories could be told most effectively. Now they are forced to wrestle with additional and constitutionally suspect constraints in relating certain newsworthy events to the public.

As a result, broadcasters have been forced to rethink how they present local and national news and sports. The "play it safe" attitude engendered by the *Golden Globe Awards Order* strikes at the heart of broadcast news, which, by its very nature, is live and uncensored. In the past, the Commission wisely recognized that "in some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing."[13] In those instances, the Commission stated that it would be "inequitable . . . to hold a licensee responsible for indecent language."[14] Now, given the inherent ambiguity in the Commission's decisions and the specter of significant fines and other penalties, broadcasters are hesitant to use audio and video of angry political demonstrations, or even structured political debate, interviews and conversations.

The Commission's new indecency policy, as a practical matter, threatens to make broadcast journalism less authentic, less insightful, and less thought-provoking. Television stations in Phoenix, Arizona, for example, cut away from live coverage of the funeral of former NFL star and Army Ranger Pat

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[13] *In re Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation Station WBAI(FM), New York, NY*, 59 F.C.C.2d 892, ¶ 4 n.1 (1976).

[14] *Id.*

Tillman when his brother twice stated that he was "fucking dead" – though the story of Mr. Tillman's death in combat operations in Afghanistan was major national news.[15] News organizations faced new questions in deciding how to report on incidents such as the heated exchange between Vice President Dick Cheney and Senator Patrick Leahy on the Senate floor in which Cheney said "go fuck yourself," and President Bush's open-mike comment to former British Prime Minister Tony Blair in which he remarked that Hezbollah must stop doing this "shit."

Live reporting often carries the risk that a speaker will blurt out a fleeting expletive without warning. In one notable example – for which the complaint is pending at the Commission – University of Pittsburgh quarterback Tyler Palko spontaneously used the word "fucking" in a postgame interview after his team defeated Notre Dame.[16] Of course, broadcast news, by its very nature, relies heavily on live reporting. And news organizations cannot control what is being said on the air all the time. The Commission's actions have diluted the first-hand, eyewitness images, sounds, and accounts unique to broadcast journalism. Live reports from journalists embedded with U.S. troops have been quelled, and broadcast footage from war zones has

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[15] *See* Romano, *Reporting Live. Very Carefully.*

[16] Associated Press, *Pitt QB Uses Expletive in Postgame Interview*, Nov. 23, 2004, *available at* http://nbcsports.msnbc.com/id/6478769/site/ 21683474.

been withheld from broadcast.[17] Broadcasters have expressed concerns about carrying live audio or video from coverage of arraignments and trials, emotionally charged demonstrations, locker room interviews, and the scenes of breaking news such as disasters. Many are concerned about or have decided against carrying live high school or college sporting events. The resulting sanitization is, in itself, a form of censorship.

It is often local and independent broadcasters that make the decision to self-censor rather than face substantial fines. Indeed, the Commission has been more than willing to fine small and independent broadcasters, including the $15,000 fine imposed on the San Mateo County Community College District for "The Blues," and the $220,000 fine imposed on independent Aerco Broadcasting Company largely for showing racy Spanish-language music videos. *Omnibus Order* ¶¶ 71, 85. This chilling effect will likely be compounded by the recent ten-fold increase in the maximum forfeiture allowable for violating the Commission's indecency regulations – which in June 2007 went from $32,500 to $325,000 per violation.[18]

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[17] *See* J.A. 253 (noting that PBS affiliates rejected broadcast footage from Iraq due to soldiers' explicit language).

[18] *Increase of Forfeiture Maxima for Obscene, Indecent and Profane Broadcasts to Implement the Broadcast Decency Enforcement Act of 2005*, 72 Fed. Reg. 33914 (June 20, 2007) (codified at 47 C.F.R. § 1.80). The maximum forfeiture was raised pursuant to the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006).

Likewise, small and independent broadcasters disproportionately bear the costs of "delay" technologies to censor live programming. In the context of its decisions on network-wide award shows, the Commission has referred to the "ease" of blocking expletives on live programming due to "technological advances," *e.g.*, *Golden Globe Awards Order* ¶ 11, even as it has disputed the adequacy of delay systems in certain cases. *See Remand Order* ¶ 34 (noting that delay and editing systems are hardly foolproof in blocking words on live television, yet blaming broadcaster for their failure); *CBS*, 2008 WL 2789307, at *32 (noting dispute between CBS and Commission over what level of delay technology was technologically feasible or sufficient to avoid liability). But much live programming is produced by local broadcasters, not the networks, and the costs of implementing delay systems are substantial. One broadcaster spent approximately $200,000 to outfit its twenty-four stations with delay technology, for example, and broadcasters also bear the cost of paying staff to function as in-house censors.[19]

To be sure, the evidence of the direct chilling effect on broadcasters is necessarily anecdotal, but it highlights the serious structural problems with the

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[19] *See* Romano, *Reporting Live. Very Carefully: Indecency Concerns Tar Programs, Hike Costs, Officials Say*, Pub. Broadcasting Rep., June 23, 2006 (discussing increased wage costs at television stations that usually employ part-time workers). The amicus brief submitted by various state broadcasters associations discusses the technical and other challenges of providing tape delays of live television programming. *See* Cal. Broad. Ass'n *Amicus* Br. at 17-19.

Commission's approach to its new indecency policy. The effectively standardless and inconsistent application of the Commission's policy in a few divergent cases provides almost no guidance for broadcasters. At the same time, many of the costs in new technology and actual or potential fines are borne by small and independent broadcasters. The result is outright self-censorship of programming – including serious news and public affairs programming – that is not indecent.

2. The chilling effect of the Commission's new indecency policy is enhanced by the possibility that broadcasters will settle and enter consent decrees rather than risk an indecency finding and massive fines.[20] Settlements, of course, insulate the Commission's notices of apparent liability from judicial review while effectively dissuading other broadcasters from broadcasting similar content. Even more dangerously, the Commission has decided to include in recent major consent decrees concessions from broadcasters imposing harsh penalties when mere *allegations* of indecency arise.

For example, as part of a 2004 consent decree, one broadcaster was required to take certain steps to discipline employees "materially participating" in the

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[20] *See* Levi, *The FCC's Regulation of Indecency*, at 21 (discussing recent large settlement agreements to resolve indecency complaints); Clay Calvert, *The First Amendment, the Media, and the Culture Wars: Eight Important Lessons from 2004 About Speech, Censorship, Science, and Public Policy*, 41 Cal. W. L. Rev. 325, 352-53 (2005) (noting pressure on Viacom to reach global settlement from multiple indecency complaints).

broadcasting of allegedly indecent content if it receives a preliminary indecency finding such as a Notice of Apparent Liability:

> (a) The employees accused of airing, or materially participating in the decision to air obscene or indecent conduct will be suspended and an investigation will immediately be undertaken;
>
> (b) Such employees will be required to undergo remedial training on the FCC's obscenity and indecency regulations and policies and satisfy station management that they understand where the line between acceptable and unacceptable programming falls before resuming their duties; and
>
> (c) If any such employee who is on-air talent is permitted to return . . . following remedial training, his or her broadcasts will be subjected to a significant time delay – up to five *minutes* – so that a program monitor will have the ability to interrupt a broadcast if its content crosses the line.

In re Clear Channel Commc'ns Inc., 19 F.C.C.R. 10,880, 10,886 (2004). Additionally, the consent decree requires that the employee *be fired* if the content is ultimately ruled indecent. *Id.* Another broadcast company also agreed to a consent decree in 2004 with only slightly less imposing conditions similarly requiring suspension, training, and a delay upon mere allegations of broadcasting indecent material. This decree required that employees responsible for indecent material be "subject to

further disciplinary action up to and including termination." *In re Viacom, Inc.*, 19 F.C.C.R. 23,100, ¶ 8(f) (2004), *aff'd on recon.*, 21 F.C.C.R. 12,223 (2006).

In this way, the chilling effect of the Commission's regulations is being pushed down to the level of individual employees whose livelihood is dependent on avoiding any risk of producing indecent content. Indeed, in one case, the Commission went so far as to commence a separate investigation into whether CBS violated a consent decree by failing to suspend certain employees following the Notice of Apparent Liability for the broadcast of an episode of "Without a Trace" – which culminated in a settlement of the investigation and alleged consent decree violation that included a "voluntary" payment of $300,000 by CBS. *See In re CBS Corp.*, Consent Decree, 22 F.C.C.R. 20,035, ¶¶ 4, 11, 13 (2007); *Letter to Howard F. Jaeckel, Esq.*, 22 F.C.C.R. 11,531 (2007). In the meantime, the Commission has yet to resolve the opposition to the "Without a Trace" NAL itself. The severe penalties for even receiving *non-final* indecency allegations guarantee that employees will steer far afield of any content that is arguably indecent, and self-censor even non-indecent content. And given that the Commission has dramatically expanded the scope of what content is even *arguably* indecent while avoiding finally resolving its indecency cases, the chilling effect of the Commission's policy will be broadly felt.

3. Finally, the Commission has further compounded the prejudicial effect of its new indecency policy by delaying resolution of pending complaints while manipulating the license renewal and license assignment approval processes. In particular, the Commission has used the pendency of indecency complaints as a basis for declining to process stations' license renewal applications – while at the same time, the Commission has effectively ceased resolving any indecency complaints at all. The Commission has further strong-armed licensees into agreeing to toll the statute of limitations on these pending indecency complaints – in some cases indefinitely – as a condition for license renewal and assignment. In the case of some license assignments, the Commission has even gone so far as to require an escrow of the potential forfeiture amount for the unadjudicated complaints. Thus, having invited more indecency complaints by greatly expanding the universe of potential content it considers indecent, the Commission has implemented what appears to be an unannounced policy decision to make those complaints even more burdensome on broadcasters.[21]

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[21] The Commission does not appear to have discussed this policy explicitly, though it is well-known in the industry. The existence of some of the tolling and escrow agreements is documented in public filings. *See, e.g., Letter to Dorann Bunkin, Esq.*, 22 F.C.C.R. 19,772, 19,773 (2007) (noting that Commission had entered into agreement to toll statute of limitations under § 503(b)(6) on pending indecency complaint as part of license renewal); *Letter to David D. Burns, Esq.*, 22 F.C.C.R. 19,218, 19,220 (2007) (noting that license assignment

By itself, the Commission's ongoing delay in resolving indecency complaints is troublesome. The Commission's statutory authority contemplates resolution of indecency complaints within a fixed period of time. Under 47 U.S.C. § 503(b)(6), the Commission must act on a pending indecency complaint within a year of license renewal to impose a forfeiture against the licensee.[22] And without a tolling arrangement, the statute of limitations for bringing forfeiture proceedings is five years from accrual. 28 U.S.C. § 2462. But in recent years, following the release of the *Golden Globe Awards Order* and other indecency orders, the Commission's resolution of indecency complaints has ground to a halt – quite possibly because the Commission is waiting for the small number of final orders it has issued to work their way through the courts.

The Commission's leveraging of its power over licensing and assignment decisions as part of its indecency policy has a direct financial impact on broadcasters. The Commission's refusal to process license renewals when indecency complaints are pending complicates and inhibits license

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was subject to establishment and full funding of an escrow account pursuant to separate agreement).

[22] "No forfeiture penalty shall be determined or imposed against any person under this subsection if-- (a) such person holds a broadcast station license issued under subchapter III of the chapter and the violation charged occurred-- (1) more than one year prior to the date of issuance of the required notice or notice of apparent liability; or (ii) prior to the date of commencement of the current term of the license, whichever is earlier . . . ." 47 U.S.C. § 503(b)(6).

assignments because license renewal is necessary before assignment to a purchaser. Moreover, even when a license is renewed by means of a tolling agreement, the unresolved complaints have a negative impact on license valuation and can inhibit a license owner's refinancing and recapitalization. The tolling agreements only extend the prejudice: while the Commission originally demanded a two-year tolling period, it appears to now be demanding a five-year, or even indefinite tolling period, and it has requested that previous tolling agreements be "voluntarily" extended. And the impact when licenses are assigned is even more stark: in the case of license owners who are selling the license but no longer doing business, the Commission requires the previous license owner place into escrow the maximum fine for a potential indecency forfeiture. This highly questionable practice constitutes, in essence, the imposition of a monetary penalty without any finding as to the validity of a complaint, and would appear to be beyond the Commission's authority.

At the very least, the Commission's practices give undue weight to unreviewed and unadjudicated indecency complaints made by members of the public. The policy thus contravenes the statutory directive of Section 504(c) of the Communications Act, which expressly provides that when a notice of apparent liability for forfeiture has been issued by the Commission, that fact "shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued" unless the fine has been paid or payment has

been finally ordered. 47 U.S.C. § 504(c). But here, broadcasters are prejudiced even by the existence of an unscrutinized indecency complaint, without even anything approaching a notice of apparent liability. The inevitable result is a chilling effect on broadcasters who face stiff penalties for broadcasting content that is not actually indecent but may be perceived by some small subset of viewers or listeners as coming too close to the line.[23]

III. THE COMMISSION'S APPLICATION OF ITS NEW INDECENCY POLICY IS CONTRARY TO THE FIRST AMENDMENT.

As should be apparent, the Commission's application of its new indecency policy runs contrary to the most basic First Amendment principles. Under the pretext of regulating indecency, the Commission has been exercising its standardless discretion to broadly regulate broadcasting content. This Court has long recognized that even when government agencies may regulate speech in furtherance of a legitimate goal, agencies may not use their power to engage in content-based restrictions. But the Commission has in fact strayed into outright content-based censorship by drawing

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[23] And only a very small number of viewers and listeners have complained to the Commission about broadcast content. According to one report, for example, 99.8% of all indecency complaints filed with the Commission during 2003 were submitted by a single activist group, the Parents Television Council. *See* Todd Shields, *Activists Dominate Indecency Complaints*, Mediaweek.com (Dec. 6, 2004), *available at* http://www.allbusiness.com/services/motion-pictures/4459242-1.html.

distinctions among programs based on its view of the value of the content or the identity of the speaker. Such arbitrary actions go well beyond the narrow regulation of indecency this Court approved in *Pacifica*.

1. This Court has repeatedly held that licensing schemes that provide a regulator with power to suppress speech, without meaningful standards limiting the regulator's discretion, are unconstitutional. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). As the Court stated when striking down an ordinance imposing a public speaking fee determined by a government official, "[n]othing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133 (footnote omitted). The Commission's application of its indecency policy is no different – indeed, it perfectly illustrates the danger of arbitrary enforcement when an agency lacks meaningful standards to check its discretion.

Here, the Commission has sought to regulate broadcast indecency – a legitimate goal under *Pacifica* – just as the government is permitted to place certain content-neutral restrictions on speech. But having decided that a single utterance of certain expletives is sufficient to trigger the Commission's indecency regulations, the Commission has altered

the role of "context" when it determines whether that content violates the Commission's indecency regulations. As a result, the Commission is enmeshed in determinations over "the nature of the artistic work," the "power, realism and immediacy of the film experience," the "authentic feel" of the work, whether the "purpose" of the work was "fulfilled" or "all viewpoints expressed" without expletives, and whether they were uttered in the middle of appropriate programming or by the appropriate speaker.

These considerations are the antithesis of clear and predictable standards that cabin the agency's discretion. The clear risk is that the Commission may act arbitrarily to encourage some content or views and discourage others in the furtherance of its indecency regulations. That is not permitted under the First Amendment:

> Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

City of Lakewood, 486 U.S. at 758.

Nor does the possibility of judicial review – review that the Commission has done its best to avoid – help the Commission's position, for "[judicial]

review cannot substitute for concrete standards to guide the decision-maker's discretion." *Id.* at 770. Indeed, the broadcaster may suffer substantial costs in the form of litigation fees and license hang-ups long before obtaining judicial review. And as well-illustrated by the examples above, the chilling effect on speech is posed "not merely [by] the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence." *Forsyth County*, 505 U.S. at 133 n.10 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)).

2. Even the considerations that the Commission has provided in support of its indecency decisions demonstrate that it is already suppressing speech based on content unrelated to the expletives themselves. In addition to attempting to divine the purposes of the programming in which the expletives appear, the Commission has suggested that other content of the program in which the expletive appears (such as with "The Early Show") or the identity of the speaker (such as the soldiers portrayed in "Saving Private Ryan") may bear on whether the Commission finds the program indecent – in the judgment of the Commission itself. However, as this Court has emphasized, "esthetic and moral judgments about art and literature . . . . are for the individual to make, not for the Government to decree." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). Such content-based determinations of whether speech is acceptable should be presumptively unreasonable, for "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.*

Finally, it is no answer to say that *Pacifica* permits the Commission to make content-based distinctions in the guise of regulating indecency. In *Pacifica*, the radio station did not contest whether or not Carlin's monologue was "patently offensive." 438 U.S. at 739. The Court emphasized "context" when discussing the availability of the broadcast within the home and to children – the "[n]uisance rationale under which context is all-important." *Id.* at 750. Nowhere in *Pacifica* did the Court suggest that the Commission could draw distinctions about whether programming was indecent based on the merits of the surrounding content or the identity of the speaker. And certainly nothing in *Pacifica* sanctions the Commission's practice of arbitrary evaluation of programming content in making its indecency determinations.

The Commission's abrupt departure from the narrow indecency policy developed following *Pacifica* deviates from the balance of First Amendment interests approved in that decision. The Commission's arbitrary and standardless application of its new indecency policy runs contrary to core First Amendment policies and must be rejected by this Court.

CONCLUSION

The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Petitioners*,

v.

FOX TELEVISION STATIONS, INC., ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF NATIONAL RELIGIOUS BROADCASTERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Amicus adopts the question presented as presented by Petitioner. The question presented for review is as follows:

> Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. § 1464, see 47 C.F.R. § 73.3999, when the expletives are not repeated.

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INTEREST OF AMICUS CURIAE[1]

National Religious Broadcasters is a non-profit, membership association with offices in Manassas, Virginia and Washington, D.C., that represents the interests of Christian broadcasters throughout the nation. Its President and CEO is Frank Wright, Ph.D. The vast majority of our approximately fourteen hundred member broadcasters is made up of radio stations, radio networks, television stations, television networks, and the executives, principals, and production and creative staff of those broadcast entities. Our member broadcasters are both commercial and non-commercial entities. For more than half a century, the mission of National Religious Broadcasters ("NRB") has been to help protect and defend the rights of Christian media and to insure that the channels of electronic communication stay open and accessible for Christian broadcasters to proclaim the Gospel of Jesus Christ. In addition, NRB seeks to effectively minister to the spiritual welfare of the United States of America.

NRB supports the Petitioners in this case because the U.S. Court of Appeals for the Second Circuit

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[1] Counsel of record to the parties in this case have consented to the filing of this *amicus curiae* brief by National Religious Broadcasters, and letters reflecting that consent have been filed with this Brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae* National Religious Broadcasters, its members, or its counsel, made a monetary contribution to its preparation or submission.

committed serious errors in vacating that Order of the Federal Communications Commission ("FCC" or "Commission") which is the subject of this case. More specifically, the court's decision erroneously raises the bar for the FCC so high that in order for the agency to successfully enforce indecency standards for television and radio, it will be forced to achieve a near-Olympian feat. Admittedly, NRB believes, as a general rule, that the Commission should leave broadcasters, including religious broadcasters, free to produce and generate broadcast content without unnecessary or unreasonable interference. On the other hand, NRB also believes that the welfare of America, its families, and its youth, will be detrimentally affected by electronic mass communications which contain unrestrained indecency, whether in language or imagery. The FCC's clarified policy on indecent expletives was a rational means to carry out the mandate of Congress that "indecent ... language ..." be prohibited over the public airwaves, 18 U.S.C. § 1464. This is particularly the case where, as here, that prohibition is enforced by the FCC *only* with respect to broadcasts where children are most likely in the viewing audience, to-wit: between the hours of 6 a.m. and 10 p.m. 47 C.F.R. § 73.3999(b) (adopted under the Public Telecommunications Act of 1992 § 16(a), Pub. L. No. 102-356, 106 Stat. 954).

STATEMENT OF THE CASE

This brief incorporates by reference the statements of fact contained in the principal brief of the Petitioners, Federal Communications Commission and United States of America.

SUMMARY OF THE ARGUMENT

The court of appeals' opinion failed to grant the FCC, a federal agency, the deference and latitude that is required when a federal court reviews the policies of an agency that are promulgated within the scope of its administrative authority. The court imposed a requirement that the FCC show why its new rule effectuates the applicable statute on indecency at least as well if not better than the prior rule, and further explain why the original reasons for the older policy are no longer dispositive. This erroneous standard usurps much of the administrative decision-making authority of the agency and elevates the bar so high that indecency enforcement may not be possible.

The FCC gave a reasoned explanation for its new policy clarification: the prior staff policy on so-called 'fleeting expletives' gave a *carte-blanche* pass to unrepeated expletives, regardless of the context in which they were uttered, and was based on a faulty reading of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Further, the prior policy created untenable distinctions between expletives which were used without a primary sexual or excretory meaning (which had to be used repeatedly in order to qualify as indecent) and expletives which had sexual or excretory meaning (which need not be repeated in

order to be held to be indecent). This distinction is illogical given the fact, as the FCC noted, that the power of an expletive lies in its sexual or excretory shock value in the first place.

The prior policy also treated expletives with sexual or excretory meanings differently from actual descriptions or depictions of sexual or excretory functions during broadcasts, another distinction which the FCC found impossible to rationally apply. The court of appeals' rejection of this reasoned explanation was based on the court's own *subjective* review of the use of the f-word at issue here; the court concluded, based on a purely *subjective interpretation*, that it could be used without any sexual or excretory meaning. The FCC, on the other hand, rightly relied on an *objective*, commonly understood dictionary definition of the word as having an intrinsically sexual core meaning, a reasoned analysis that the court rejected out of hand.

The court's opinion eviscerates this Court's jurisprudence in the *Pacifica* case, which had set forth the rule that the FCC could prohibit indecent words communicated at times when children would most likely be in the audience, as long as the FCC's evaluation took into consideration the context in which the word(s) were communicated. The court of appeals' decision requires the FCC to make a distinction between literal and non-literal uses of a given expletive, parsing the analysis down to a microscopic level, and thus eliminating the necessary flexibility the Commission needs to formulate policy in a delicate area where the First Amendment needs to be balanced against the FCC's statutory mandate. The FCC decided that the particular words at issue in the music awards programs here, from an

objective basis, have an inherently sexual or excretory connotation, and because there was no proffered justification for their utterances based on context, both could fall within the sanction of its newly articulated policy. The court of appeals, arrogating to itself the authority of a super-agency, usurped the FCC's authority to make that determination.

When the FCC made a determination that in the absence of its rule, there would be a *potential* for escalation of verbal broadcast indecency, the court of appeals pigeon-holed the FCC's evaluation as "divorced from reality." Yet there is ample evidence, much of it cited by the FCC itself pursuant to its own expertise, that there has been a rise in verbal crudity and indecent language in broadcasts in the post-*Pacifica* years during which the FCC staff had given a free-pass to single episodes of an indecent expression.

The court of appeals also burdened the FCC with an unrealistic and precedent-ignoring requirement to show actual harm to children by exposure to the indecent expletive at issue here. This Court has never required this kind of strenuous, empirical evidence when the protection of children is involved. Yet our review of recent American cultural responses to the expletive involved in this case shows that, in a variety of different professional settings, our society has generally condemned the very expletive that the FCC found to be indecent when featured in adult situations. Nevertheless, the court of appeals inexplicably found no evidence of harm to children.

Further, the court erroneously opined in *dicta* that the FCC's indecency policy is constitutionally

flawed. It noted that the policy would likely be found to violate the First Amendment, but reached that conclusion by citing a Supreme Court case dealing with internet speech, a substantially different communications species than the regulated television and radio airwaves at issue here. The court of appeals also failed to note that the expletive here is entitled to only the merest level of free speech protection, and failed to appreciate that at the time of day when the programs aired, the indecent expression was exposed to a maximum number of child viewers.

Finally, the court's opinion not only conflicts with this Court's decision in *Pacifica*, but also conflicts with the rule in several other Supreme Court cases that the First Amendment provides no shield for conduct that negatively impacts the moral or social welfare of children.

ARGUMENT

I. THE FCC'S REASONS FOR ADJUSTING ITS INDECENCY POLICY WERE RATIONAL AND REASONABLE

A. The Court of Appeals Failed to Give the Required Deference and Latitude to the FCC

The court of appeals, in considering the Commission's articulated reasons for adjusting its indecency policy, failed to give the FCC either the administrative latitude or the deference to its agency expertise that was duly required. As a result, the court's conclusion that the FCC failed to provide an adequately reasoned explanation for the adjustment in its indecency policy is fatally flawed.

It is well settled that federal agencies, such as the FCC, "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" *Motor Vehicle Manuf. Ass'n of the U.S., Inc. v. State Farm Auto. Mut. Ins. Co.*, 463 U.S. 29, 42 (1983) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-845 (1984); *Massachusetts v. EPA*, 549 US __, 127 S. Ct. 1438, 1459 (2007). While the Administrative Procedure Act (hereinafter the "APA"), empowers courts to determine if agency decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), "[t]he scope of [such] review . . . is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. All that is required of the agency is that "[it] examine the relevant data and articulate a

satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

The court of appeals should have simply "'consider[ed] whether the [FCC's] decision was based on a consideration of the relevant factors and whether there ha[d] been a clear error of judgment.'" *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (*internal citations omitted*). Yet, as demonstrated throughout its opinion, the court elected to apply its own more exacting test, imposing a standard of needle-threading precision upon the FCC -- in essence requiring it to "explain why the original reasons for adopting the rule or policy are no longer dispositive... [and to give a] ... reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule." *Fox Television Stations, Inc. v. FCC*, 489 F.3d 456, 457 (2007) (citing *N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Rel. Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)).

This standard of proof, mandating that the FCC show that its newly clarified rule is at least as good if not "better than the old rule", erroneously places the court of appeals in the position of being a super-agency and final arbiter of the efficacy and wisdom of the FCC's policies. The net effect of the court's misconstrued standard was to "sen[d] the Commission back to run a Sisyphean errand while effectively invalidating much of the Commission's authority to enforce 18 U.S.C. § 1464." FCC, *Petition for A Writ of Certiorari*, 2007 WL 3231567, at 15 (Nov. 1, 2007).

B. The FCC Gave Sufficient and Adequate Reasoning for Why its Prior Indecency Policy Regarding Fleeting Expletives was Unworkable and Required Adjustment

The FCC rejected Fox's argument that Ms. Richie's utterances of the f-word and the s-word were fleeting and isolated and, therefore, could not be actionably indecent under the policy as applied by the staff prior to 2004. In rejecting this reasoning, the FCC cited to, affirmed, and then further clarified its disavowal of the staff's policy, first articulated in its 2004 *Golden Globes Order*.[2] Fox based its argument upon staff letters[3] and Commission dicta[4], contending that because Ms. Richie's expletives were fleeting, isolated and used outside of their core sexual or excretory meaning, they were not actionable.

The court of appeals found that the FCC did not adequately explain what the court had deemed to be a "180-degree turn regarding its treatment of 'fleeting expletives'...." *Fox Television*, 489 F.3d at 455. In so doing, the court rejected and criticized the well-reasoned explanations that the FCC provided for its adjustment and harmonization of its policy.

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[2] Memorandum Opinion and Order, *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the 'Golden Globe' Awards Program*, 19 F.C.C.R. 4975 (2004) (hereinafter "2004 *Golden Globes Order*").

[3] *See* 2004 *Golden Globes Order*, 19 F.C.C.R. at 4980, nn. 31 & 32 for a listing of some of these decisions.

[4] *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (1987) ("If a complaint focuses solely on the use of expletives, we believe that ... deliberate and repeated use in a patently offensive manner is a requisite to a finding of indecency..."). It was this *dicta* upon which the Staff based its 'fleeting utterance' enforcement policy.

1. The prior policy created artificial and untenable distinctions that could no longer be maintained

Under the prior FCC staff policy, expletives used outside of their core sexual or excretory meaning had to be used "deliberate[ly] and repeated[ly]" to be considered indecent, while expletives used to describe or depict sexual or excretory functions were indecent even if they were not repeated. See *Pacifica Foundation*, 2 F.C.C.R. at 2699; Order, *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 13299, 13306-13307 (2006) (hereinafter the "*Remand Order*"). The Commission, while continuing to carefully consider and weigh the First Amendment rights of broadcasters, clarified in the *Remand Order* that "this [old staff] guidance was seriously flawed." *Id.* at 13308.

First, the FCC rightly explained that the prior staff policy created an artificial and irrational distinction between 'expletives' on the one hand and 'descriptions or depictions of sexual or excretory function' on the other; the FCC concluded that this distinction was inapposite to the fact that, "an 'expletive's' power to offend derives from its sexual or excretory meaning." *Id.* In other words, the f-word and the s-word are categorically indecent no matter how they are used in a sentence because their meanings are inherently either sexual or excretory.[5]

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[5] As the FCC stated in its 2004 *Golden Globes Order*, "we believe that given the core meaning of the "F-word," any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition." 2004 *Golden Globes Order*, 19 F.C.C.R. at 4978.

Second, the FCC pointed out that, in certain cases, this distinction set forth in the prior staff policy was virtually impossible to apply given the difficulties in determining whether a word was being used as an expletive or as a literal description. *Id.*

The court of appeals rejected the FCC's second reason on the grounds that these words are often used in the public lexicon without any sexual or excretory meaning, thus it should not be difficult to tell them apart. *Fox Television*, 489 F.3d at 459. In support of this statement, the court cited with approval to NBC's proffered anecdotes of world leaders using expletives apparently without having any sexual or excretory connotation. *Id.* at 459-60 (citing Brief of Intervenor NBC at 31-32 and n.3). Moreover, the court faulted the FCC for failing to provide proper record evidence of its own. *Id.* at n.10. Yet in its Order, the Commission had cited the *American Heritage College Dictionary* (*Remand Order*, 21 F.C.C.R. 13304 at n.39) as providing a common definition of the f-word as having a primarily sexual meaning. Further, the FCC also cited an article in a law review journal where the author concluded that the usage of the word "has at least an implicit sexual meaning." *Id.* at 13305 n.40.

The court of appeals was not free to substitute its own speculations for the reasoned analysis of a federal agency on matters within the scope of that agency's expertise. Whether language is 'indecent' in the context of national broadcasts during the family viewing hour is not a matter that is judicially self-evident; rather, it is a matter to be assessed by the Commission which has been vested with that regulatory authority. The FCC reasonably exercised

its appropriate sphere of legal authority. The court of appeals, however, did not.

2. The 'fleeting utterance' exception ignored context, which was inconsistent with this Court's decision in *Pacifica*

As a further reasoned explanation for adjusting its indecency policy, the FCC recognized that the prior policy essentially, and illogically, required an exception for those fleeting utterances that did not describe or depict sexual or excretory functions; yet, as the FCC recognized, this approach ignored the important, long-standing tradition of taking context into account. *Remand Order*, 21 F.C.C.R. at 13304. The Commission's adjustment of the policy harmonized the approach to be taken toward *all expletives* to ensure that each is fully reviewed in context. This was no radical, unexplained departure from prior indecency decisions. Rather, the FCC merely recognized that continuing to review indecency complaints without contextual distinctions was inconsistent with its statutory mandate and further conflicted with this Court's decision in *Pacifica*.

The court of appeals, however, did not find this rationale persuasive, concluding that this justification actually *ignored* rather than *emphasized* the context of broadcast content. According to the court, "the Commission's own policy of treating all variants of certain expletives as presumptively indecent and profane, whether used in a literal or non-literal sense, also fails to comport with this 'general approach' that 'stresses the critical nature of context.'" *Fox Television*, 489 F.3d at 460 (quoting *Remand Order*, 21 F.C.C.R. at 13308 and referencing

2004 *Golden Globes Order*, 19 F.C.C.R. at 4978). Yet, in the same paragraph of the 2004 *Golden Globes Order* referenced by the court of appeals in the quote above, the Commission explained that the question of whether a word has an inherent sexual connotation is part of the first prong of the indecency review, while the contextual analysis is present in the second prong. Thus, regardless of whether the word at issue is inherently sexual in nature, the Commission would still review its context in the second prong analysis as part of its deliberations.

Further, the Commission's policy creates the flexibility necessary to balance its enforcement authority with the legitimate concerns of free speech under the First Amendment. This strenuous balancing act was recognized by this Court in its 1973 decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, when it stated that, "[t]o perform its statutory duties, the Commission must oversee without censoring. This suggests something of the difficulty and delicacy of administering the Communications Act – a function calling for *flexibility* and the capacity to adjust and readjust the regulatory mechanism to meet changing problems and needs." 412 U.S. 94, 118 (1973) (emphasis added).

Indeed, the FCC's modified policy at issue here, which employs a contextual analysis for *all* broadcast content that is challenged as indecent, utilizes this kind of "flexibility," thus preventing the FCC's policy from becoming an absolute and inflexible bar on speech. At the same time, the policy ensures that the FCC comports with its statutory duty to ensure that no one utters "any obscene, indecent or profane language by means of radio communication." 18

U.S.C. § 1464. The court of appeals has rendered an entire universe of indecent content unsanctionable, and in particular the f-word, a word commonly recognized as indecent.[6] This is hardly the "flexibility" approach envisioned by this Court in *Columbia Broadcasting System.*

3. Contextual analysis is not new to the Commission

The Commission has been considering context in its indecency enforcement as early as the policy that was endorsed by this Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). There, the Court explained that, "[t]he Commission's decision rested entirely on a nuisance rationale under which *context is all-important....*" *Id.* at 750 (emphasis added). Indeed, in its 2001 *Policy Statement* on indecency, the Commission outlined its historical use of context as an all-important factor in its indecency determinations.[7] *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8002 (2001) (hereinafter "*Policy Statement*").

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[6] See footnotes 18-24 *infra* for multiple examples in which our society has condemned this particular word.

[7] *See Narragansett Broadcasting Co. of Cal., Inc. (KSJO(FM))*, 5 F.C.C.R. 3821 (1990); *S.F. Century Broadcasting, L.P. (KMEL(FM))*, 7 F.C.C.R. 4857 (1992); *In re Application for Review of the Dismissal of an Indecency Complaint Against King Broadcasting Co. (KING-TV)*, 5 F.C.C.R. 2971 (1990).

4. There are several factors within the contextual analysis that may justify or condemn fleeting expletives

Further, the FCC's adjusted policy was rational and reasonable because it applies a host of fact-intensive criteria that focus on the context in which the expletives were used, thus not only avoiding a blunt, inflexible rule that would impinge on the First Amendment but also helping to create a more nuanced approach in determining whether a given expletive is 'indecent' in the context of a particular broadcast. Indeed, the policy itself recognizes that the three main factors[8] in the contextual analysis "must be [weighed and] balanced to ultimately determine whether the [broadcast] material is patently offensive ... [because] [e]ach indecency case presents its own particular mix of these, and possibly other, factors." *Policy Statement*, 16 F.C.C.R. at 8003. In addition to the three main factors, other factors are to be used in the contextual analysis by the FCC, such as whether the material has artistic merit,[9] if the material is presented as part of a news

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[8] These are: 1) the explicitness or graphic nature of the description; 2) whether the material dwells on or repeats at length the descriptions; and 3) whether the material panders to, titillates or shocks the audience. *Policy Statement*, 16 F.C.C.R. at 8004.

[9] *Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, 4512-13 (2005) (broadcast of numerous expletives in "Saving Private Ryan" not indecent because "deleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.")

interview or *bona fide* news story,[10] if the material is of communicative necessity,[11] if the material was merely a spontaneous slip of the tongue,[12] and whether the material was deliberately gratuitously presented.[13] The application of these fact-intensive criteria in various cases is strong evidence of how nuanced, thoughtful and cogent the Commission's overall policy is, particularly with respect to balancing broadcasters' First Amendment rights with the necessity to keep indecent material off of the airwaves at certain times of the day.

Perhaps one of the most important factors that the FCC is allowed to consider is the makeup of the

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[10] *Peter Branton*, 6 F.C.C.R. 610 (1991) (broadcast of wiretap recordings of John Gotti that featured numerous expletives, as part of *bona fide* news story not indecent); *Remand Order*, 21 F.C.C.R. at 13327 (broadcast of news interview on *The Early Show* in which interviewee used "s-word" not indecent); *Merrel Hansen, Pac. & So. Co., Inc. (KSD-FM)*, 6 F.C.C.R. 3689 (1990) (broadcast of excerpts from *Playboy* interview with Jessica Hahn regarding her alleged rape found to be indecent as exceptionally explicit and vulgar and presented in pandering manner).

[11] *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 2664, 2665 (2006) (broadcast of numerous expletives in "The Blues: Godfathers and Sons" indecent, in part because "we disagree that the use of such language was necessary to express any particular viewpoint in this case").

[12] *In re Applications of Lincoln Dellar, Renewal of the Licenses of Stations KPRL(AM) and KDDB(FM), Paso Robles, Cal.*, 8 F.C.C.R. 2582, 2585 (1993) (news announcer's use of single expletive isolated and accidental, thus not indecent); *L.M. Commc'ns of S.C., Inc. (WYBB(FM))*, 7 F.C.C.R. 1595 (1992).

[13] *Remand Order*, 21 F.C.C.R. at 13307-13308 (Richie's comments deemed deliberate in light of admonition from Hilton to "watch the bad language" and Richie's confident and fluid delivery).

audience at the time of the program. This Court recognized in *Pacifica* that the time of day in which the broadcast was made as well as the makeup of the audience could be considered. *Pacifica*, 438 U.S. at 750. The FCC most certainly took the time of day and the makeup of the audience into account in its analysis of the 2002 and 2003 *Billboard Music Awards*. Indeed, the Commission cited to *Pacifica* when it stated that according to Nielsen ratings data, "during an average minute of 'The 2003 *Billboard Music Awards*' broadcast, ... 23.4 percent of the 9,871,000 people watching the program were under 18, and ... 11 percent were between the ages of 2 and 11.'" *Remand Order*, 21 F.C.C.R. at 13305-06. This data also supports the concern that during primetime, children are a plentiful component of the TV audience, hence the prohibition on indecent material being aired between 6 a.m. and 10 p.m. 47 C.F.R. § 73.3999(b).

Yet in its decision, the court of appeals misconstrued the Commission's use of these contextual factors. Rather than viewing these as factors to be considered by the FCC in its overall judgment and decision-making, the court intimated that, with the exception only of the makeup of the audience, they constituted outright exemptions. *Fox Television*, 489 F.3d at 458-59. To reach that myopic conclusion, the court of appeals ignored what should have been obvious -- that these various factors are merely *considerations* to be weighed within the total contextual analysis, not categorical exclusions.

Indeed, the nature and plethora of these factors adopted by the Commission for consideration in indecency cases shows that its policy advances, rather than conflicts with, a balancing approach that

weighs both the guarantees of the First Amendment as well as the FCC's statutory mandate. The court of appeals' decision, while decrying the Commission's analytical scheme, actually *eliminates flexibility* by ruling that every expletive, no matter how grossly indecent, is given one free pass from any FCC sanction or enforcement.

C. The FCC's Observation that the Prior Policy Wrongly Required Viewers and Listeners to Endure the "First Blow" of Indecency was a Well-Reasoned Justification in Support of the Policy Adjustment

The FCC also observed that the prior policy essentially required viewers and listeners to endure what this Court coined the "first blow"[14] of indecency before the FCC could act. *Remand Order*, 21 F.C.C.R. at 13308 (quoting *Pacifica*, 438 U.S. at 748-49). The court of appeals rejected the FCC's use of the "first blow" theoryto support the change in its policy, reasoning that the theory bears no rational connection with the actual policy. In the court's opinion, the "first blow" theory would appear to protect viewers and listeners from all indecent material while the FCC's actual policy would "permit even numerous and deliberate uses of [the f-word] in certain contexts." *Fox Television*, 489 F.3d 459 n.9.

What that reasoning fails to recognize, however, is that the "first blow" theory only applies to material that is *indecent*, not non-indecent and therefore

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[14] "To say that one may avoid further offense by turning off the radio when he hears *indecent language* is like saying that the remedy for an assault is to run away after the first blow." 438 U.S. at 748-49.

permitted, uses "of the [f-word] in certain contexts." *Id.* When the policy is applied, including the contextual analysis, and the material is found not to be indecent, no one endures a "first blow" of indecency because the material is not indecent. The court's logic in finding that the FCC's reliance on the "first blow" theory to be inconsistent because it permitted some uses of the f-word, therefore completely ignored the premise of the "first blow" theory – indecent material. Contrary to the court's criticism, the FCC's policy adjustment to ensure that non-repeated expletives did not induce a "first blow" was actually a rational and well-reasoned decision that was never contradictory.

Within this discussion of the "first blow" theory, the Commission determined that, absent its new rule, there could be an increase in expletives during those hours in which children would likely be in the audience. *Remand Order*, 21 F.C.C.R. at 13309. In other words, broadcasters would have little incentive to ensure that their programming was free of indecent material until the 'second blow' was about to hit. *Id.* The court of appeals viewed this portion of the FCC's discussion about the "first blow" theory as a separate and distinct reason for the change in its policy and declared that such a reason was "divorced from reality." *Fox Television*, 489 F.3d at 460. As far as the court was concerned, since the FCC itself stated in its *Remand Order* that even during the 'safe harbor' provision of 10:00 p.m. to 6:00 a.m., "with rare exceptions, [broadcasters] do not allow the 'F-Word' or the 'S-Word' to be broadcast during that time period..." (21 F.C.C.R. at 13310), this meant that the Commission acknowledged that there was not a barrage of expletives on the

airwaves. 489 F.3d at 460. Further, the court decided that the FCC was unable to make this argument because it contradicts prior experience and the FCC failed to provide record evidence to show that its "prediction" will likely come true. *Id.* at n.11.

Yet, the court misconstrued the actual statement made by the FCC. The FCC did not, in fact, make a "prediction" about what would happen in the future. Rather, it merely considered the *potential* for increased indecency should the policy as it was remain in place, specifically stating that "broadcasters would be able to air any one of a number of offensive sexual or excretory words, regardless of context, with impunity during the middle of the afternoon provided that they did not air more than one expletive in any program segment." *Remand Order*, 21 F.C.C.R. at 13309.[15] Indeed, the Commission prefaced its remarks by stating, "it would *as a matter of logic* permit broadcasters to air expletives at all hours of a day so long as they did so one at a time." *Id.* (emphasis added).

Moreover, even if the court properly construed the FCC's statements as a "prediction" of increased indecency absent its policy clarification, the court should have deferred to the agency's expertise and agreed, as we do, with the dissent of Judge Leval that "if obligated to choose, I would bet my money on

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[15] The FCC made a similar statement in its 2004 *Golden Globes Order*: "If the Commission were routinely not to take action against isolated and gratuitous uses of such language on broadcasts when children were expected to be in the audience, this would *likely* lead to more widespread use of the offensive language." 19 F.C.C.R. at 4979 (emphasis added).

the agency's prediction." *Fox Television*, 489 F.3d at 472 (Leval, J., dissenting).

Nevertheless, the FCC did cite evidence on this point. Specifically, in the 2004 *Golden Globes Order*, it cited to a study that found a significant increase in offensive language on broadcast television between 1990 and 2001 in support of its reasoning that an adjustment in its policy was required and necessary. 19 F.C.C.R. at 4979 (citing Barbara K. Kaye and Barry S. Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, 7 J. Mass Commc'n & Soc'y 429, 441 (2004)). Further, in the *Remand Order*, the Commission cited to examples of the numerous complaints that were received by stations from parents who were blatantly outraged at the expletives used in the 2003 *Billboard Music Awards* that they watched with their children. *Remand Order*, 21 F.C.C.R. at 13310. The FCC more than adequately documented what it saw as signs of a worsening problem.

D. The FCC's Concern Regarding the Potential Escalation of Broadcast Indecency Was Reasonable

Moreover, the FCC's concern about the potential for escalations in the use of expletives during times when children are likely to be in the audience is well-documented in numerous other studies. The Pew Research Center for the People and the Press issued a study in April 2005 showing that "[f]ully 68 percent [of those surveyed] believe that children seeing so much sex and violence on TV gives them the wrong

idea about what is acceptable in society."[16] Also, "a two-thirds majority (66 percent) say that entertainment TV shows *are worse now than they were five years ago....*" *Id.* at 4 (emphasis added). Of that 66 percent of responders, 22 percent complain most about the sexual content and another 16 percent cite to the "depiction of immoral behavior and a lack of good values." *Id.* And, while this study showed that the vast majority (79 percent) of those surveyed blamed lack of parental oversight or supervision for those times when children are exposed to sex and violence on television, 91 percent of the parents surveyed stated that they watch television with their children, ranging from half of the time or occasionally (47 percent) to usually (35 percent) to always (9 percent). Only 8-9 percent of parents reported never watching television with their children. *Id.* at 15.

Furthermore, the court's condemnation of the Commission's logic was an impermissible substitution of its own judgment for that of the agency. As this Court clearly stated in *State Farm*, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." 463 U.S. at 50 (cited in *Fox Television*, 489 F.3d at 457). The Commission – not the court – is in the best position to evaluate current viewing and listening trends.

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[16] The Pew Research Center for The People & The Press, *New Concerns about Internet and Reality Shows – Support for Tougher Indecency Measures, But Worries About Government Intrusiveness*, April 19, 2005 at 2, http://people-press.org/reports/pdf/241.pdf.

E. Empirical Evidence of Harm Was Not Required to Justify the FCC's Indecency Policy Adjustment

The court of appeals found that "the FCC's decision ... is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation." *Fox Television*, 489 F. 3d at 461 (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822-23 (2000) for the notion that proof of such "harm" is a *sine qua non* for regulation of indecency over the airwaves.)

This Court's decision in *Playboy*, however, dealt with Congress's novel attempt to prohibit "signal bleed" from the imperfect scrambling of sexually explicit content during broadcasts over *cable television*. Congress required cable programmers to either "fully scramble" the signal (an impracticality for most cable programmers and companies) or to alternatively refrain from providing the sexual programming content during daytime hours when children might be watching. Most cable companies chose the later course. This Court found was available, but because Congress had not chosen it, the cable law unnecessarily burdened the First Amendment rights of viewers. In stressing this issue, this Court illustrated why the *Playboy* decision, which dealt with *cable television and not* (as here) *public spectrum television broadcasting*, is inapposite to the case under review:

> There is, moreover, a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block

> unwanted channels on a household-by-household basis.
>
> *Playboy Entm't Group, Inc.*, 529 U.S. at 815.

Further, the court of appeals in this case implies that there must be proof of an empirical 'problem' arising from "first blow" indecent speech during family viewing hours to support the FCC's decision to tighten its restrictions on non-repeated indecency. *Fox Television*, 489 F.3d at 461. This level of proof conflicts with decided cases where regulations are enforced to protect children. In upholding a child pornography statute, this Court recently noted (without empirical data) that the distribution of child pornography "increases 'the harm to the child.'" *United States v. Williams*, 553 U.S. ___ (2008), slip op. at 17, (citing *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

But beyond that, the court of appeals' reliance on *Playboy* for its insistence on empirical proof of harm is entirely misplaced. The alleged 'problem' identified by this Court in *Playboy* was *not* the potential harm to children from viewing sexually explicit material, without parental consent. In fact, the presence of such harm was clearly presumed. The District Court in *Playboy* found that Congress had a "compelling" interest in trying to restrict that kind of juvenile viewing from occurring, and further observed that "[w]e recognize that the Supreme Court's jurisprudence does not require empirical evidence." *Playboy Entm't Group, Inc. v. United States*, 30 F. Supp 2d 702, 716 (D. Del. 1998), *aff'd*, 529 U.S. 803 (2000).

In affirming, this Court made the similar observation that:

> First, we shall assume that many adults themselves would find the material highly offensive; and when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it.

Playboy Entm't Group, Inc., 529 U.S. at 811. Here, the court of appeals failed to appreciate that the real 'problem' that Congress did not sufficiently document in *Playboy*, was that, "[h]ere, there is no probative evidence in the record which differentiates among the extent of bleed at individual households and no evidence which otherwise *quantifies the signal bleed problem*." *Id.* at 821 (emphasis added).

This Court's recognition of the presumed potential for harm to children when exposed to sexual content in the *Playboy* decision is simply one more example of the fact that certain indecent (though not legally "obscene") content can be judged potentially harmful to children even though not susceptible of the kind of empirical 'evidence' that the court of appeals erroneously required.[17] The FCC cited, as an example, the Nielsen ratings data that a large number of children were watching the 2003 *Billboard Music Awards* during which Ms. Richie uttered her gratuitous f-word; and over a million viewers between the ages of two and 11 were among them. *Remand Order*, 21 F.C.C.R. at 13305-

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[17] See also the judicial recognition of the potential harm to children from exposure to indecency, in the cases cited in this brief at section II. B. 3. *infra*.

13306. While we would suggest that even this 'evidence' of harm is not necessary here, the FCC's reference to it, at a minimum, dispels the court's characterization of the Commission's decision as void of evidentiary support.

Nevertheless, there is strong evidence that our society, as a whole, departs from the court of appeals' unrealistic view of indecent speech and its supposed neutral effect on children. When it comes to indecent language in movies at the theater, as an example, parents tend to avoid attending films with their children that have indecent language, while supporting those with cleaner language.[18]

Even in the adult professional world, there is a general intolerance for indecent speech. The National Football League fined Atlanta Falcon running back Michael Vick $20,000 for making an indecent gesture during a game that simulated the f-word.[19] NASCAR racing officials fined and assessed driving champion Dale Earnhardt Jr. penalty points

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[18] "*Study: Less Cussing = More $$ for PG Films*," CBSnews.com, carrying a Mar. 13, 2008 Associated Press article at http://www.cbsnews.com/stories/2008/03/13/business/main3933843.shtml. ("A new study by The Neilsen Co. found that the PG-rated movies with the least profanity made the most money at the U.S. box office ... 'Parents are choosing PG films for their kids that have very, very low levels of profanity,'" referencing a Nielsen study of 400 films in general release from the fall of 2005 until fall of 2007) (last visited May 1, 2008).

[19] "*N.F.L. ROUNDUP: Obscene Hand Gesture Toward Fans Costs Vick $20,000*," The New York Times.com, Nov. 30, 2006, http://query.nytimes.com/gst/fullpage.html?res=9B02ED613EF933A05752C1A9609C8B63&scp.

for using indecent language during an interview.[20] Even newspapers, usually the bastions of free speech, draw the line at indecent language in their blogs: *The Washington Post* decided to close down one of its online blogs, in part, because of "profanity" aimed at its ombudsman.[21] In May, 2008, a television news anchor in New York who uttered an indecent word, found it necessary to give a quick, very public, and visibly pained apology; and another reporter was terminated when he shouted an expletive at hecklers while he was on the air in 2005.[22]

Children who are exposed regularly to that kind of indecent fare will inevitably have a harder time appreciating the fine line that sometimes divides lawful from unlawful use of indecency when it is directed at others. As one commentator has pointed out, the f-word here, when used under some circumstances, can be viewed as the equivalent of that a less restrictive technological option (channel blocking) verbal rape.[23] Courts and juries have held that the use of that word can be part of complex of

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[20] Viv Bernstein, "*Earnhardt Fined For Checkered Language*" The New York Times.com, Oct. 6, 2004, http://www.nytimes.com /2004/10/06/sports/othersports/06nascar.html.

[21] Katharine Q. Seelye, "*Paper Decides To Close Blog, Citing Vitriol*," The New York Times.com, Jan. 20, 2006, http://www.nytimes .com/2006/01/20/business/media/20blog.html.

[22] James Barron, "*When an Anchor Curses on the Air, She Becomes the Night's Top Story*," New York Times.com, May 14, 2005, http://www.nytimes.com/2008/05/14/nyregion/14simmons.html?_r=2&oref=slogin&ref=n.

[23] Stephen L. Carter, *Civility – Manners, Morals, and the Etiquette of Democracy* 149 (Basic Books 1999).

facts creating an illegal, hostile work environment.[24] In this Court's well-known "fighting words" decision in *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942), a state disorderly conduct conviction was upheld for the defendant's use of terms "damned racketeer" and "damned Fascist" when he directed them at another person.[25]

Admittedly, in the context of the adult world at least, we are often cautioned that exposure to offensive ideas, even those laced with indecency and vitriol, is the price we must pay for freedom of speech. Yet surely that does not mean that our nation's youth must also be required to sacrifice a measure of their childhood as a part of the bargain.

II. THE COURT OF APPEALS' *DICTA* OPINION ON CONSTITUTIONAL ISSUES WAS ERRONEOUS

The court of appeals' comments on the constitutional issues in this case, even though characterized as *dicta*, prove to be the proverbial 'elephant in the room'. Those comments improvidently restrict the FCC's statutory authority and also eviscerate this Court's indecency precedent.

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[24] *See Beach v. Yellow Freight Sys.*, 312 F.3d 391, 394-95 (8th Cir. 2002); *Tutman v. WBBM-TV, Inc.*, 209 F.3d 1044, 1046-47 (7th Cir. 2000); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 482-83 (3rd Cir. 1997).

[25] It is noteworthy that this Court in *Chaplinsky* recognized that when offensive "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth ... any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 315 U.S. at 572.

A. The Court of Appeals' *Dicta* Opinion on the Constitutionality of the Commission's Policy Directly Conflicts with this Court's Decision in *Pacifica*

The court of appeals sided with the networks' argument that the FCC's indecency standard is unconstitutionally vague, partly in light of this Court's 1997 decision in *Reno v. ACLU* (521 U.S. 844), in which the Court struck down an Internet indecency standard. *Fox Television*, 489 F.3d at 464. The court of appeals opined that it was unlikely that the FCC's standard could withstand scrutiny under *Reno*. *Id.* The court's conclusion in that regard is clearly erroneous for reasons explained below. But, the court of appeals' *dicta* on the constitutional issue is also misguided because it failed to fully comprehend, or apply, the ruling in *Pacifica*.

As recognized by this Court in *Pacifica*, the presence of children in the audience creates a special area of regulatory authority for the FCC. 438 U.S. at 749-750. Moreover, this Court has also recognized that the government has a compelling interest "in protecting the physical and psychological well-being of minors [including] ...shielding minors from the influence of literature that is not obscene by adult standards." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (citing *Ginsberg v. New York*, 390 US. 629, 639-40 (1968); *Ferber*, 458 U.S. at 756-57). As demonstrated in *Pacifica*, this governmental interest also applies to the broadcast medium, and has particular applicability in that arena in ways that may not apply to other forms of communication. The court of appeals, however, failed to appreciate this critical and important factor regarding a television audience populated by children. As a

result, it erroneously endorsed the networks' view that *Pacifica* was a dead letter in light of *Reno*.

B. The Court of Appeals Misapplied the *Reno* case

1. The court of appeals, in siding with the networks, ignored the fact that the broadcast medium is subject to much more regulation than other types of speech

The networks argued in their petitions to the Commission regarding the television programs at issue in the *Remand Order*, that the FCC's very definition of indecency was unconstitutionally vague.[26] They pointed to the 1997 decision of this Court in *Reno v. ACLU* in which this Court struck down a similarly-worded definition in the Communications Decency Act of 1996 ("CDA") because of "the many ambiguities concerning the scope of its coverage...." 521 U.S. at 870. However,

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[26] The networks also argued that the limited First Amendment protection provided to indecent broadcast content must now be expanded in light of the marked changes in the marketplace since 1978 when *Pacifica* was decided, with the dramatic increase in original programming on cable and satellite providers. The Commission rejected this argument, noting that there are still millions of households, many presumably with children, that have televisions that only receive broadcast signals. *Remand Order*, 21 F.C.C.R. at 13319-13319. Thus, the "broadcast media continue to have 'a uniquely pervasive presence' in American life." *Id.* at 13318. Moreover, over-the-air broadcast television still remains uniquely accessible to children since there are few technological mechanisms that parents can use to block broadcast signals into the home. Even the v-chip is proving to be less effective than hoped where many of the ratings provided by the networks for use with the v-chip are erroneous. *Id.* at 13320-13321 n.162.

like the critical distinction in the *Playboy* case between cable and spectrum broadcasting, so also in *Reno* this Court's treatment of the CDA, an Internet regulation, has no application to broadcasting.

A higher degree of indecency regulation is permitted in broadcasting, unlike the Internet, due to the invasiveness of radio and television.[27] Further, broadcast spectrum continues to be a scare commodity. These factors that allow for greater regulation of broadcast speech are not present with the Internet; thus, this Court found that a web-based media should not be subjected to the level of regulation as is applied to the broadcast medium. See *Reno*, 521 U.S. at 870.

By relying on the *Reno* case, the court of appeals failed to take into account the vast differences between broadcasting and other media of expression.

2. Expletives such as those at issue here are entitled to only limited First Amendment protection

The court of appeals also failed to recognize the very limited constitutional protection afforded to the kind of indecent and gratuitous expressions involved in this case. As this Court observed in *Pacifica*: "[w]hile some ... [patently offensive] references [to excretory and sexual organs and activities] may be protected, they surely lie at the periphery of the First Amendment concern." 438 U.S. at 743. Not only did the court of appeals fail to recognize this principle, but it went so far as to suggest that indecency

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[27] See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637-38 (1994); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

regulations imposed by the FCC on broadcasters may have to withstand the highest kind of judicial scrutiny in order to survive:

> [w]e would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.

489 F.3d at 465 (citing this Court's decision in *Playboy*, *supra*). There is simply nothing in *Pacifica*, nor in the unrelated progeny of *Playboy* or *Reno*, that remotely suggests the applicability here of a "strict scrutiny" analysis.

Lastly, to the extent that the court of appeals is implying that the FCC's burden of proof under a "strict scrutiny" standard might also require a showing that a *less restrictive* means is *unavailable* to achieve the desire regulatory effect, it is noteworthy that satisfactory alternatives to the FCC's present indecency rule simply do not exist.[28]

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[28] See note 26 *supra* regarding the inadequacies of "v-chip" technology as a means of screening out objectionable television content. Also, the television "rating" system done by the television industry, while admirable and helpful in making general selections of program viewing, is not an adequate method to prevent children from being exposed to indecent language. One study in 2002 determined that 68 percent of prime-time network programs which *did not* carry the television rating of "L" (crude and indecent language) nevertheless had such language included in no less than three scenes per program. Dale Kunkel, *et al.*, *Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 J. of Comm'ns 112, 132 (2002).

3. The presence of children is also a compelling factor for the increased regulation of indecency carried over the airwaves

The potential impact of television, the medium at issue in this case, on the perceptions, values, and morals of children is massive. On average, children watch between two and four hours of television per day.[29] Some 30 percent of children three years old and younger have a television set in their bedrooms, and 43 percent of children between the ages of four and six have a television in their bedroom.[30]

As such, the court of appeals' decision is also at odds with the analogous jurisprudence of this Court which recognizes the delicate balance to be struck when the interests of children are at stake. Cf. *Ginsberg*, 390 U.S. 629 (Court upheld NY statute banning sale of sexually-oriented materials to minors even if it could not similarly prohibit the sale to adults); *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986) (upholding suspension of student who used indecent speech in school assembly with audience of 'captive' 14-year olds, noting "the otherwise absolute interest of the speaker in reaching an unlimited audience [may be limited] where the speech is sexually explicit and the audience may include children." *Id.* at 684); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982) (school board may remove books that are 'vulgar'); *Morse v. Frederick*, 551 U.S. ___, 127 S. Ct. 2618 (2007) (banner interpreted as violating school's

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[29] Nielsen Media Research (2004-2005 season).

[30] Kaiser Family Foundation, *Zero to Six: Electronic Media in the Lives of Infants, Toddlers, and Preschoolers* 7 (Fall 2003).

ban on pro-drug messages, not subject to First Amendment protection).

The breathtaking pronouncements of *dicta* by the court of appeals seem to presage its opinion that nearly any attempt by the FCC to prohibit single, gratuitous expressions of indecency during children's viewing hours will be unconstitutional. Not only is that in violent conflict with settled Supreme Court law in *Pacifica*, but it also shows a callous disregard for the powerful influence, for good or for evil, of the medium of television on the hearts and minds of America's children.

CONCLUSION

For the reasons set forth above, National Religious Broadcasters urges this Court to reverse the decision of the U.S. Court of Appeals for the Second Circuit, and to reinstate the Order of the Federal Communications Commission in its entirety.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Petitioners,

—v.—

FOX TELEVISION STATIONS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc. ("MIM") as *amicus curiae*,[1] files this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37.

MIM is a New York, non-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media.

MIM has an interest in this case because it is concerned with legal and law enforcement issues related to obscenity, child pornography, the broadcasting and other mass communication of indecent material. MIM recognizes this case to be a major precedent in regulating broadcast indecency.

Amicus is filing this brief in support of the Petitioner because we believe our brief contains relevant matter and alternative arguments that should be heard and may not be presented to the Court by the parties.

---

[1] This Brief *Amicus Curiae* was authored in whole by Counsel of Record Robin S. Whitehead and Co-Counsel Robert W. Peters of Morality in Media, Inc. and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus* made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

CONSENT TO FILE BRIEF

The written consents of the parties were requested and all parties have consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

The lower court erred in finding that the FCC's policy regarding "fleeting expletives" was arbitrary and capricious under the Administrative Procedure Act. In the seminal case of *FCC v. Pacifica* this honorable court never stated that an "occasional expletive" could not be actionable, nor was it decided that only literal uses of expletives were actionable. *Amicus* argues that a nuisance rational provides a "middle road" between banning all expletives and allowing at least one in every broadcast program, regardless of circumstances. Lastly, *amicus* maintains that strict scrutiny analysis is not appropriate for regulations concerning the broadcast medium.

ARGUMENT

I. IN *PACIFICA*, THE SUPREME COURT DID NOT HOLD THAT AN 'OCCASIONAL EXPLETIVE' CAN NEVER BE ACTIONABLE

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*"), this Honorable Court upheld a Federal Communications Commission determination that a 12 minute George Carlin monologue entitled "Filthy Words" was indecent as broadcast. The *Pacifica* Court emphasized the "narrowness of its holding,"[2] stating:

> This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction...[3]

Justice Powell also said in his concurring opinion that the holding:

> [D]id not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent her.[4]

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[2] *Id.* at 750.

[3] *Id.*

[4] *Id.* at 760-761 (Powell, J., concurring).

In emphasizing the narrowness of its holding, however, the *Pacifica* Court did not hold that a single expletive could never be actionable, since that issue was not before the Court. The Court did say that the FCC's decision "rested entirely on a nuisance rationale under which context is all important"[5] and that the "concept requires consideration of a host of variables."[6]

While the FCC chose to interpret *Pacifica* in the narrowest possible manner (and in good measure negating its responsibility for maintaining decency standards in broadcasting[7]), most broadcasters took a different view, as indicated by the following articles:

> When it was the 'Seven Dirty Words,' we knew what they were and we didn't say them," says Rick Cummings, president of Emmis's radio division, referring to the forbidden words made famous by the comedian George Carlin uttering them...[8]
>
> In 1978, the FCC ruled that piss and six other words were indecent and forbidden

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[5] *Id.* at 750.

[6] *Id.*

[7] *Fox Television Stations v. FCC*, 489 F.3d 444, at 449, n.4 (2d Cir. 2007)["At the time, the Commission interpreted *Pacifica* as involving a situation 'about as likely to occur again as Haley's Comet.' Brief of *Amici Curiae* Former FCC Officials at 6 (quoting FCC Chairman Charles D. Ferris, Speech to New England Broadcasting Assoc., Boston, Mass, July 21, 1978)"].

[8] Ann Marie Squeo, "Firing of 'Love Sponge' Signals Cleanup of Shock Radio," *Wall Street Journal*, Feb. 25, 2004, p. B1.

when children are likely among a broadcast station's audience.[9]

For the first time since the Supreme Court affirmed the ability of the FCC to regulate when so-called indecent material could be aired on radio...the FCC clarified what exactly what might be considered indecent material...Prior to this document, there was a common assumption in the radio biz that indecency primarily amounted to the "seven dirty words," and the best way to avoid a fine was to avoid or bleep these words...[10]

The [*Pacifica*] Court's concerns were also allayed by the narrowness of the FCC's "seven dirty words" rule. The majority argued that speakers could always find another vocabulary to express the same ideas. The broadcast industry took this statement as an invitation. The 1980s and '90s saw the proliferation of "shock jocks:" loud, crude (and highly popular) radio hosts - typified by Howard Stern - who frequently found ways to talk about sex without using the seven dirty words.[11]

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[9] Bill McConnell, "Seven provisionally dirty words? Damn!," *Broadcasting & Cable*, July 8, 2002.

[10] "FCC Crackdown on Indecency?," www.mediageek.net/index.php?paged=138, 6/21/01

[11] Jonathan Wallace, "Pervasive problem: The 1978 Supreme Court Decision Allowing Censorship of Dirty Words on Radio Threatens Free Speech in Cyberspace," *Reason Magazine*, Oct. 10, 1998.

II. CHILDREN DO NOT NEED TO HEAR A CURSE WORD REPEATED OVER AND OVER IN ORDER TO ENLARGE THEIR VOCABULARY

In distinguishing *Cohen v. California,* 403 U.S. 15 (1971), the *Pacifica* Court observed, "Although Cohen's written message[12] might have been incomprehensible to a first grader, *Pacifica's* broadcast could have enlarged a child's vocabulary in an instant."[13]

A child does not need to hear a four-letter word repeated over and over again in order to enlarge his or her vocabulary.[14] That can happen in an instant. Nor does a child have to understand the meaning of a four-letter word for harm to result. All the child has to do is repeat the word. Nor does a child have to be exposed to "verbal shock treatment" for harm to result. To the contrary, as the excerpt from an article published in the *New York Daily News* indicates, children often think that four-letter words are exciting.

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[12] Cohen entered a courthouse wearing a jacket emblazoned with the words "F··k the Draft."

[13] *Pacifica,* 438 U.S. at 749.

[14] *See, e.g.*, "It's A Whabbit," Talaris Institute ("Sometime around 18 months, a big change occurs. Young children start to recognize familiar sounds and sound patterns quickly when they hear them, and they begin to piece these familiar sounds together like puzzle pieces to form new words. This helps children learn to say new words after hearing them only once or twice."), published at http://www.talaris.org/spotlight_wabbit.htm; *See also*, "What A Chatterbox," published at http://www.talaris.org/spotlight_wordspurt.htm

Sarah was stunned when her then 4-year-old daughter, Abby, started swearing like Richard Pryor...Turns out Abby wasn't the only underage fan of the phrase. Her entire preschool class had picked it up. "One boy learned it last year and it went around," remembers Sarah, a 35 year-old teacher who lives in the upper West Side [of New York City]. Abby (all names have been changed to protect the not-so-innocent children) didn't know what she was saying, but 5 year-old Breanne certainly does. The kindergartner from Ridgewood, NJ, calls her older sister an "a·····" and makes an obscene gesture at her...Bad language is an epidemic. And one that's striking those at the tenderest age. These days, tots are almost as likely to swear as grownups. But while most adults know when to hold their tongues... kids may not. And whether they're 4 or 14, they risk sounding aggressive, obnoxious, crude and very, very rude...True enough, but why are little one's mouthing off? One reason is that it is exciting... Not only is it fun to swear, but most epithets are appealingly multi-purpose and can be inserted into every sentence...Youngsters also trash talk because it's so widespread in the media. Whether it's David Wells hurling an expletive after a bad pitch during the World Series, U2's Bono shouting the same one at the Golden Globes...indecent

phrases are on TV, videos, popular music and print.[15]

To their partial credit the broadcast TV networks have never aired programming as grossly vulgar as George Carlin's "Filthy Words" monologue. And yet, as the following surveys show, a large majority of parents are concerned about what their children hear on TV.

According to survey conducted in 2007,[16] 77% of parents said they were concerned that their children are exposed to too much "adult language" in the media that they use; and 32% of parents said that "inappropriate content" in TV was what concerned them "most" (in comparison, 21% said inappropriate content in the Internet was what concerned them "most").

According to a survey conducted in 2005,[17] 69% of parents were concerned that their children hear "adult language" on TV.

According to a survey conducted in 2002,[18] 90% of parents said "TV gets worse by the year in terms of bad language and adult themes."

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[15] Alev Aktar, "From the Mouths of Babes...Comes Forth a Stream of Foul Language. What's All the Gutter talk?" *N.Y. Daily News*, May 16, 2004; *See also*, Pat Burson, "What Did You Say?! Television, music and even parents are a big influence when children talk trash," *Newsday*, Apr. 16, 2008.

[16] "Parents, Children & Media," Kaiser Family Foundation, June 2007, pp. 24, 22.

[17] "Support for Tougher Indecency Measures, But Worries About Government Intrusiveness," Pew Research Center for People & Press, Apr. 19, 2005, pp. 12-13.

In 1993, more than 500 readers responded to a *N.Y. Daily News* survey[19] on the subject of TV violence. In response to the question, "Do you think language on prime time shows is damaging to your children," 69.6% said yes. In response to the question, "Have you noticed your children's language change after they watched a show," 54.8% said yes.

It would, of course, be helpful to have "scientific proof" showing both that children do learn "bad words" from listening to media in general and broadcasting in particular and that their use of these words can result in various harms to them and others. But it would be foolish and unethical to expose a group of children to an "isolated expletive" or to a barrage of expletives to determine whether or how such exposure affects them and others.

Furthermore, as the Supreme Court observed in *Paris Adult Theater I v. Slaton*,[20] the Constitution does "not demand of legislatures 'scientifically certain criteria of legislation.'" That scientific proof is lacking, however, does not mean there is no harm. Set forth below are excerpts from many articles showing the adverse effects of kids cursing or swearing in schools.

> Many of the students I've known won't sit down unless they are repeatedly asked to

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[18] Press Release, "Parents in New Survey Report Limited Success Teaching Their Kids 'Absolutely Essential' Values," Public Agenda, Oct. 2, 2002.

[19] "Feds Gotta Act Now," *N.Y. Daily News*, Dec. 12, 1993.

[20] 413 U.S. 49, at 61 (1973); *See also, Ginsberg v. New York*, 390 U.S. 629, at 641-643 (1968).

(maybe not even then), and they don't listen just because the teacher is speaking; even "good teachers" are occasionally drowned out by the din of 30 students simultaneously using language that would easily earn a movie an NC-17 rating.[21]

Reprimands didn't work. Neither did detentions or suspensions... In November, [educators and police officials] authorized police officers assigned to two of the city's public high schools to begin issuing tickets to students who hurl expletives. The fine: $103. The officers have issued about 60 tickets to students...There are already signs that the new approach may be working, some teachers and principals say. Fights have decreased, classrooms are calmer, and there is less cursing in the corridors.[22]

A young girl sits bleeding and hysterical in the school nurse's office after getting punched in the face by another kid... Students curse at each other and cut classes to wander in trash-strewn halls beneath falling down ceilings. These are scenes from some of the city's most troubled middle schools – all in Brooklyn... IS 91 "is one of the saddest schools we've ever seen," wrote...Vanessa Witenko after

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[21] Tom Moore, "Classroom Distinctions," *N.Y. Times*, Jan. 19, 2007.

[22] Abigail Sullivan Moore, "Say #!% and Pay $$$, Hartford Tells High School Students," *N.Y. Times*, Dec. 14, 2005.

a visit last spring..."The day of our visit, students cursed each other and belittled adults and one another," she wrote.[23]

Dan Horwich's English class is a bastion of clean language, where students read the classics and have weighty discussions free of invective and profanity. But when the bell rings and they walk out his door, the hallway vibrates with talk of a different sort. "The kids swear almost incessantly," said Horwich, who teaches at Guildford High School in Rockford, Ill. "They are so used to swearing and hearing it at home, and in the movies, and on TV, and in the music they listen to that they have become desensitized to it." In classrooms and hallways and on the playground, young people are using inappropriate language more frequently than ever, teachers and principals say. Not only is it coarsening the school climate and social discourse, they say, it is evidence of a decline in language skills. Popular culture has made ugly language acceptable and hip, and many teachers say they only expect things to get uglier.[24]

When Linda's son was just 10, she says he showed her a nasty e-mail written about

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[23] Elizabeth Hays, "'Saddest' Schools," *N.Y. Daily News*, Sept. 4, 2005.

[24] Valerie Strauss, "More and More, Kids Say the Foulest Things; Anti-Swearing Efforts Falling on Deaf Ears," *Washington Post*, Apr. 12, 2005.

him that was laced with expletives and sent to his classmates behind his back. She says her son told her...it had been written by his 10-year-old best friend. The nasty e-mail had been triggered by an argument the two had at school..."My son was upset by it."[25]

New York public high school teachers are taking it from all sides. They deal with pot-smoking, curse-spewing kids who disrupt their classes...Most of the kids I teach...are cooperative and want to learn. But...I've found that there are always two or three bad apples. They're the ones who talk, curse...This morning, I saw an ex-student in the halls. Whenever I pass this 14-year-old she mutters "b----" under her breath...I tried calling a student's home today, because of behavioral problems. She is a 15-year old who called me a f------ b---- and tells me I cannot "f------ tell her what to do."[26]

Some folks think salty language adds flavor to the way we communicate...But many others agree with Pamela Boyd, calling it part of the dumbing down of America. "The f-word and the s-word are just huge on the playground," says Boyd, 52, who teaches fifth and sixth graders in Tumwater, Wash.

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[25] Julie Janovsky, "When Kids Turn Cyber Bullies," *N.Y. Newsday*, Apr. 1, 2004.

[26] Anonymous, "Bell to Bell: A Day In a Teacher's Life, *N.Y. Post*, Apr. 13, 2000.

Recently, she heard a social worker use the s-word on a cable TV news show. And she recalls hearing the word used on a prime-time TV show, CBS' *Chicago Hope*, and treated by reviewers "as if it were a breakthrough. Movies and TV keep pushing the envelope and calling it progress. It becomes much harder to draw the line in schools."[27]

Today the halls of the nation's schools echo with language that would stand a sailor's hair on end. Teachers and principals say kids are cursing more often than they used to...In a recent poll of high school principals, 89% said they face profane language and provocative insults towards teachers and other students on a regular basis. Educators say that cursing shows students' lack of respect for themselves and others...Bill Carruthers, a ninth grade teacher at Hurst (Texas) Junior High School, says if he hears students cursing casually in the hallway, he tells them its inappropriate language ... Carruthers blames the cursing problem on TV. "Students hear the language on TV and at the movies, and they get the impression its acceptable anywhere." He also thinks cursing is a sign of laziness.[28]

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[27] Karen S. Peterson, "SAY WHAT? Pervasive Profanity Has Turned Self-Expression to $#@*!," *USA Today*, Mar. 21, 2000.
[28] Nanci Hellmich, "Today's Schools Cursed by An Increase in Swearing," *USA Today*, May 20, 1997.

Out of the mouth of babes comes Marine-barracks language. Loud and crude, it can be heard in school hallways...American school children have never been more foul-mouthed – or so it seems to many parents and educators who are privy to the trash talk that often passes as childish chatter...Other kids are so inured to cursing that they seem baffled that some find it offensive...But profanity can still be potent, even for those who use it casually. In schools, "language is the first symptom of conflict—the small stuff escalates," says Ronald D. Stephens, executive director of the National School Safety Center...When center officials interviewed 4th-through-12th-graders around the nation during a two year study, students mentioned name calling, cursing or staring...as the most common triggers for violence, he says. [29]

...Adds [name omitted here], "Guys come up to me and say right to my face, 'Girl, you got some big (ones)'"...These young women aren't talking about construction workers on the street, but their classmates at [school name omitted] in Alexandria, VA, where I teach English...One senior girl told me that the most vulgar comments she has heard directed towards girls came from white boys at a small, private Episcopal school she used to attend...Legal considerations aside, the major question is

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[29] Ellen Graham, "Language of Childhood: No Expletives Deleted," *Wall Street Journal*, July 17, 1995.

how schools can help bring about more civil and respectful relationships in a generation of boys and girls who have been constantly exposed to gross-out sitcoms, radio DJs, music lyrics.[30]

Day after day, 7-year-old [name omitted here] complained to her mother about the teasing, foul language and even lewd behavior of boys on the school bus...[Name omitted] may be the youngest student ever to have a federal sexual harassment complaint filed on her behalf against another student...The school denies any wrongdoing. "We teach kids from kindergarten on you should not be abusive in your language...," Superintendent Jerry McCoy says. Children, influenced by TV and videos, are using saltier language at a younger age than a few years ago, said child psychologist Susan Erbaugh, director of children's services at Minneapolis Children's Medical Center. [Name omitted], a second grader, told of children on her bus using four-letter words...Another time, she said a boy stared at two first-grade girls and made lewd comments about their sex organs.[31]

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[30] Patrick Welsh, "Students Find Sexual Harassment A Way of Life," *USA Today*, Jan. 6, 1999.

[31] "Harassment Suit Accuses Boys on School Bus," *Associated Press*, Oct. 21, 1992.

III. IN *PACIFICA,* NEITHER THIS COURT NOR THE FCC DETERMINED THAT ONLY LITERAL USES OF EXPLETIVES WERE ACTIONABLE

On October 3, 2003, the FCC's Enforcement Bureau released an Order[32] denying 234 complaints regarding the live broadcast of the Golden Globe Awards. The complainants said that during the program the performer Bono uttered the phrase, "this is really, really, fucking brilliant" or "this is fucking great."[33] In its Order, the Bureau stated:

> As a threshold matter, the material aired during the Golden Globe Awards program *does not describe or depict sexual or excretory activities and organs.* The word "fucking" may be crude and offensive, but, in the context presented here, *did not describe sexual or excretory organs or activities.* Rather, the performer used the word "fucking" as an adjective or expletive to emphasize an exclamation. Indeed, in similar circumstances, we have found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is *not within the scope of* the Commission's prohibition of indecent program content.[34] [Emphasis added by *Amicus*]

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[32] In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 FCC Rcd. 19859.

[33] *Id.*

[34] *Id.* at 19861.

It is one thing for the Commission to determine that *how* an expletive is used (as an adjective, expletive, insult or description) is a variable in determining whether content is indecent. It is quite another for the Commission to determine that a vulgar term for sexual or excretory activities or organs, when used as an "adjective" (as in, "That c···k s····r is the best in the business") or as an "expletive to emphasize an exclamation" (as in, "Holy s··t, I won!") or as an "insult" (as in, "You mother f···· r"), is per se not indecent. The latter determination is not only a departure from *Pacifica*, it is also a departure from common sense.

Nowhere did the FCC or the *Pacifica* Court say or hold that the seven "dirty words" were actionable only when Carlin meant to use them literally (as in, "Did you see those kids f·····g in the car seat?"). In fact, one of Carlin's uses of the s-word was quite similar to Bono's use of the f-word in the Golden Globe program. At one point during his monologue, Carlin stated, "S··t, I won the Grammy, man, for the comedy album."[35] As *Broadcasting & Cable* also observed in an editorial,[36] "But hasn't George Carlin's M-word always been an epithet rather than an accusation of incest?" Rather than focusing on whether Carlin used the words figuratively or literally, both the Commission and the Court looked to the plain meaning of the words.

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[35] *Id.* at 752.

[36] "Curioser and Curioser," July 8, 2002.

In its Declaratory Order,[37] the Commission noted that the monologue consisted of a:

> comedy routine, frequently interrupted by laughter from the audience, and that it was almost always totally devoted to the use of words as "shit" and "fuck," as well as "cocksucker," "motherfucker," "piss," and "cunt"...Thereafter, there is repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience.[38]
>
> ....the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt," and "tit" *depict* sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent."[39] [Emphasis supplied by *Amicus*]

In describing the Commission's action, the *Pacifica* Court said:

> The Commission identified several words that *referred to* excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in

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[37] Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, NY, 56 FCC2d 94, Released Feb. 21, 1975.

[38] *Id.* at 95.

[39] *Id.* at 99.

> an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent.[40] [Emphasis supplied by *Amicus*]

In rejecting the contention that "prurient appeal is an essential component of indecent language,"[41] the *Pacifica* Court said:

> Similarly, regardless of whether the *"4-letter words"* and sexual description set forth in "Lady Chatterly's Lover"...made the book obscene for mailing purposes, *the utterance of such words* or the depiction of sexual activity on radio or TV would raise similar public interest and Section 1464 questions.'"[42] [Emphasis supplied by *Amicus*]

In rejecting the contention that the indecency definition was overbroad, *Pacifica* said:

> The Commission's definition of indecency will deter only the broadcasting of patently offensive *references to* excretory and sexual organs and activities."[43] [Emphasis supplied by *Amicus*]

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[40] *Pacifica*, 438 U.S. at 739.
[41] *Id.* at 741.
[42] *Id.* at 741, n.16.
[43] *Id.* at 743.

IV. NUISANCE RATIONALE PROVIDES A 'MIDDLE ROAD' BETWEEN BANNING ALL EXPLETIVES AND ALLOWING AT LEAST ONE IN EVERY BROADCAST PROGRAM, REGARDLESS OF CIRCUMSTANCES

It ought to go without saying that when Congress enacted the Radio Act of 1927, it did not intend to give broadcasters a right to use the public airwaves to curse or swear at least once in every program. That Act included a provision making it unlawful to "utter *any* obscene, indecent, or profane language by means of radio communications." [Emphasis supplied by *Amicus*]

Presumably, had persons of influence thought Congress exceeded its authority when it prohibited *any* indecent language in the Radio Act of 1927 they would have challenged the prohibition in the courts. Presumably, they would also have gone to court in 1934 when Congress adopted the 1934 Communications Act, which included this provision: "No person within the jurisdiction of the United States shall utter *any* obscene, indecent, or profane language by means of radio communication." And again in 1948, when Congress enacted 18 U.S.C. 1464 which then read: "Whoever utters *any* obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."

Perhaps it would be unwise at this late date to attempt to roll back the clock to 1927 or 1934 or 1948 and to insist that when Congress said *any* obscene, indecent or profane language, it meant what it said.

Amicus would also contend, however, that it would be just as unwise, if not more so, for this Honorable Court to now determine that broadcasters have a constitutional right to utter a single or "occasional" expletive, regardless of circumstances.

It doesn't take much imagination to think what will happen if this Court holds that the First Amendment gives broadcasters a constitutional right to curse or swear at least once in every program, regardless of circumstances.

Instead of it being Ed McMahon beginning the Tonight Show with, "Here's Johnny," it will be someone saying, "Here's your favorite c--k s----r." Instead of it being Red Skelton signing off with, "Good night and God bless," it will be someone signing off with, "Good night and go f--k someone or yourself." And that's just the program beginnings and endings.

The Court below was of the opinion that the Commission's warning about what broadcaster's would do if this Court were to hold that they had a right to curse or swear at least once in each program was "divorced from reality."[44] But many TV broadcasters think they must compete with cable TV to succeed;[45] and when it comes to profanity, just

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[44] *Fox Television Stations v. FCC*, 489 F.3d 444, at 460 (2d Cir. 2007).

[45] *See, e.g.*, Barbara S. Kaye & Barry S. Saplosky, "Offensive Language in Prime-Time TV: Four Years After Television Age & Content Ratings," *Journal of Broadcasting & Electronic Media*, Dec. 2004 ["The fierce competition between cable and broadcast programs is also a contributing factor...Broadcast executives feel that bowing to network censors and advertisers

about anything goes on cable.[46] And it isn't just TV broadcasters; it is also radio broadcasters who air "shock jocks." Furthermore, since broadcasters often refuse to delay live programming, they will have no control over what some "celebrity" will say in an entertainment, "news" or sports program.

Following passage of the Telecommunications Act of 1996, which prescribed procedures for establishment of a TV rating system and for inclusion of the V-Chip in new TV sets, your *Amicus* submitted comments to the FCC in response to a Public Notice.[47] *Amicus* stated in part: "While Morality in Media supports an acceptable rating system, it also believes the 'V-Chip' will be a 'Trojan Horse' if it becomes another excuse to shift responsibility off the purveyors of objectionable programming onto parents."

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puts their programs at a disadvantage to cable fare that is not subject to the same content restrictions (Armstrong, 2001; Farhi, 2002; Van Munching, 2001)"].

[46] *See, e.g.*, Ann Oldenburg, "Cussing on 'Deadwood' Sets Tongues A-Wagging," *USA Today*, May 2, 2004 ("On Sunday's show, there were at least 63 mentions of the f-word in the hour."); Kristen Fyfe, "South Park Filth Fest," Culture & Media Institute, June 15, 2007 ("*South Park*, one of the signature shows on Viacom's Comedy Central network, is trumpeting this weekend's broadcast of its "Dirty Dozen"...No, *South Park's* "Dirty Dozen" is proudly promoted as the 'twelve most foul-mouthed, filthiest and sexually offensive episodes ever.' These episodes include one in which the s-word was used 162 times...").

[47] Public Notice, *Commission Seeks Comment on Industry Proposal for Rating Video Programming*, CS Docket No. 97-55, FCC 97-34, Report No. CS 97-6 (Feb. 7, 1997).

According to one study that examined "the types and amounts of offensive language on prime-time TV four years after age and content restrictions were implemented:"

> The broadcast industry claims that the content- and aged-based ratings systems adequately alert viewers to offensive content. This study supports assertions that the warning systems give further license to broadcasters to include more profane television dialogue. The rate per hour of curse words jumped by 51% to about one such word every 8 minutes in prime time. Offensive language on prime-time television declined in 1997, but in the 4 years between 1997, when the age- and content-based alerts were first implemented, and 2001, each category of swearing increased. Mild-other words grew in frequency by 44% and excretory words spiked 547%.[48]

According to a study conducted by Parents Television Council:

> Foul language during the Family Hour increased by 94.8% between 1998 and 2002 and by 109.1% during the 9:00 p.m. ET/PT time slot. Ironically, the smallest increase (38.7%) occurred during the last hour of

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[48] Barbara S. Kaye & Barry S. Saplosky, "Offensive Language in Prime-Time TV: Four Years After Television Age & Content Ratings," *Journal of Broadcasting & Electronic Media*, Dec. 2004

> prime time – the hour when young children are least likely to be in the viewing audience.[49]

Whatever the strength or weaknesses of arguments for prohibiting all obscene, indecent or profane words or for allowing at least one obscene, indecent or profane word in each broadcast program, there is a middle road between the two extremes – namely, when utterance of such language amounts to a nuisance, it can be prohibited in broadcasting. Factors to consider in determining whether of a single expletive constitutes a nuisance include:

1. Time of day (e.g., the so-called "family hour")
2. Nature of the audience (e.g., large numbers of kids likely to be watching)
3. Nature or character of the person uttering the expletive (celebrity, hero, etc.)
4. Nature of the expletive (some words are more offensive than others)
5. How the word is used (whether used literally or figuratively)
6. Nature of the program (e.g., having serious political, literary, artistic or scientific content as opposed to banal entertainment)
7. Whether use of the expletive itself is "justified" by its serious journalistic,

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[49] Executive Summary, "The Blue Tube: Foul Language on Prime Time Network TV," *Parents Television Council*, Sept. 15, 2003, p.5.

artistic, literary, or political value (e.g., as in "Saving Private Ryan")

8. Whether the program is live or recorded (problem of unforeseen utterances)

Since the *Pacifica* Court has stated that the regulation of indecency is so closely tied to that of nuisance law,[50] *amicus* maintains that a single act of indecency can be found to constitute a nuisance. In *Michigan v. Bennis*, 527 N.W.2d 483 (Mich. 1994), *aff'd., Bennis v. Michigan*, 516 U.S. 442 (1996), the defendant was arrested for gross indecency after police officers approached his parked car, shined a flashlight into the front seat, and witnessed a known prostitute performing an act of fellatio on him. After defendant was convicted, the prosecutor filed a complaint alleging that defendant's vehicle was a public nuisance subject to abatement.

The Michigan Court of Appeals reversed the decision of the trial court, holding that the prosecution had an obligation to demonstrate that defendant's wife knew that he used the vehicle in a manner proscribed by the statute and that proof of a single incident of lewdness, assignation, or prostitution is insufficient to establish a nuisance.

In reversing the Court of Appeals, the Michigan Supreme Court held that the language of the Michigan nuisance statute obviates the requirement of an owner's knowledge of the proscribed activity[51] and that the nuisance abatement statute allows the abatement of a vehicle

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[50] *Pacifica*, 438 U.S. at 750-51.

[51] 527 N.W.2d at 493-495.

where the driver contributed to an existing condition (i.e., prostitution) that is a public nuisance.[52]

One of the issues in *Bennis* was what amount of activity was necessary to prove the existence of a nuisance since the statute did not indicate the amount of activity necessary to prove the existence of a nuisance.[53] Looking to Michigan precedent,[54] the State Supreme Court held that the nuisance statute "does not specifically require more than a single incident of conduct."[55]

Bennis illustrates that a single act can constitute a nuisance and also provides authority for the proposition that when a single act is part of a larger problem, a single act can constitute a nuisance.

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[52] *Id.* at 491.

[53] *Michigan v. Bennis*, 527 N.W.2d at 489.

[54] *Id.* at 490. "This Court has declared a public nuisance where an act 'offends public decency.' *Bloss v Paris Twp*, 157 N.W.2d 260 (1968) (The *Bloss* Court upheld an injunction of the operation of an outdoor theater showing explicit movies where neighborhood children could view the films from outside the drive-in. The Court held: 'It is our judgment that the foisting off of a display of pictures not fit for children to see onto places within their view on public streets, on residential properties and in private homes, without the consent of the property owners and the parents, is a public nuisance.')...In *Garfield Twp v Young*, 82 N.W.2d 876 (1957), the Michigan Supreme Court held that to constitute a nuisance the activity must be harmful to the public health, or create an interference in the use of a way of travel, or affect public morals, or prevent the public from the peaceful use of their land and the public streets. The rationale is that a nuisance involves a continuing detrimental effect on the public. The nuisance abatement statute serves the same general purpose.

[55] *Id.* at 489.

V. 'STRICT SCRUTINY' IS NOT THE APPROPRIATE STANDARD FOR REVIEW OF BROADCAST REGULATION

In *FCC v. League of Women Voters*, 468 U.S. 364, at 374-376 (1984), the Supreme Court had this to say about the appropriate standard of review for broadcast regulation:

> We begin by considering the appropriate standard of review. The District Court acknowledged that our decisions have generally applied a different First Amendment standard for broadcast regulation than in other areas, but after finding that no special characteristic of the broadcast media justified application of a less stringent standard in this case, it held that § 399 could survive constitutional scrutiny only if it served a "compelling" governmental interest...At first glance, of course, it would appear that the District Court applied the correct standard...But, as the Government correctly notes, because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve "compelling" governmental interests.

Another Supreme Court precedent, *Columbia Broadcasting v. Democratic National Committee*, 412 U.S. 94 (1973), is also applicable here. Quoting *Red Lion*, the *Columbia Broadcasting* Court said, "it is

idle to posit an unabridgeable first amendment right to broadcast comparable to the right of every individual to speak, write or publish."[56]

In *Pacifica*, this court also said:

> We have long recognized that each medium of expression presents special First Amendment problems...And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection...The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans... Second, broadcasting is uniquely accessible to children, even those too young to read.[57]

In the case below, however, the Court of Appeals stated that it is "increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children"[58] and that the TV networks "rightly rest their constitutional arguments in part"[59] on *United States v. Playboy Entertainment Group*,[60] where the court applied "strict scrutiny" to a federal law that would have required cable TV operators to either completely scramble the signals for pay porn channels or to air

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[56] *Columbia Broadcasting*, 412 U.S. at 101.

[57] *Pacifica*, 438 U.S. at 748-749.

[58] *Fox Television Stations v. FCC*, 489 F.3d at 465.

[59] *Id.*

[60] 529 U.S. 803 (2000).

the imperfectly scrambled signals only from 10 p.m. to 6 a.m.

In the first place, when Congress enacted the Radio Act of 1927 and made it unlawful to "utter *any* obscene, indecent, or profane language by means of radio communications," it could not have been said that radio "had established a uniquely pervasive presence in the lives of all Americans."[61] By 1930, only 40% of all U.S. households had purchased radio receivers.[62]

In the second place, *Amicus* would contend that in 1978 it was not broadcasting's "uniqueness" per se that justified special treatment but rather the fact that by 1978 broadcasting had in fact become pervasive, unlike any other form of media. By 1978, televisions were in almost every home and radios were in almost every home, car and truck. Portable radios could also be taken almost anywhere. The average citizen also willingly spent far more time in front of a TV or near a radio than they did reading a daily newspaper, and unwilling listeners were often also exposed to broadcasts. Broadcasting was also accessible to children too young to read.

In the third place, today, unlike cable[63] and satellite[64] TV systems, broadcast TV signals reach

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[61] *Pacifica*, 438 U.S. at 748.

[62] Steve Craig, "How America Adopted Radio: Demographic Differences in Set Ownership...in 1930-1950 U.S. Censuses." *Jrnl. of Broadcasting & Electronic Media*, Vol. 48, No. 2, 2004.

[63] *See, e.g.*, "Satellite TV Gains on Cable," www.consumeraffairs.com, Aug. 16, 2006 ("58% of households subscribe only to cable").

into almost 99% of homes and the audience for broadcast radio is vastly larger than for satellite radio.[65] Thus broadcasting still does have a "uniquely pervasive"[66] presence in the lives of all Americans. Furthermore, while terrestrial broadcasting must now compete with cable, satellite, and the internet, if anything, broadcast *programming* is even more pervasive because it is carried on all cable and satellite TV systems[67] and to a growing extent, on the internet.

Furthermore, the concerns that justified regulation of broadcasting in the first place – namely, protecting the privacy of the home and children – were made even more pressing by the proliferation of new forms of electronic media, which also reach into the home and are accessible to children. The advent of cable TV, satellite TV and radio, the Internet, and wireless, not to mention videotapes, DVDs and videogames, has made a parent's job tougher, not easier.[68]

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[64] *Id.* ("29% of U.S. households subscribe to satellite service alone").

[65] *See, e.g.*, "State of the News Media 2008: Radio Audience," Project for Excellence in Journalism, published at http://www.stateofthenewsmedia.org/2008/radio

[66] *Pacifica*, 438 U.S. at 748.

[67] Over the air broadcasting had its limitations, including susceptibility to atmospheric and electrical interference and inability to reach remote regions.

[68] *See, e.g.*, "Navigating the Children's Media Landscape: A Parent's and Caregiver's Guide," By American Institutes for Research, Prepared for Cable in the Classroom and National PTA, Apr. 4, 2004.

According to a survey conducted in 2007 by Kaiser Family Foundation, "two-thirds (65%) of parents say they are 'very' concerned that children are exposed to too much inappropriate content in the media and a similar proportion (66%) favor government regulations to limit TV content during the early evening hours."[69]

In the instant case, the Court of Appeals also stated that "blocking technologies such as the V-chip have empowered viewers to make their own choices about what they do, and do not, want to see on television."[70] The V-chip, however, doesn't block particular words or programs; it blocks all programs with a particular rating; and if a parent wants to use the V-chip to block a particular program, that parent must also block all other programming with the same rating, including programming that may not be objectionable to the parent.[71] How a program is rated also depends on the integrity and good sense (or lack thereof) of the producer who created it or the network that broadcasts it; and many programs are not properly rated.[72] The V-chip also does not block sponsor advertisements or program promos or news and sports programs;[73] and many TVs (older TVs and

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[69] "Parents, Children & Media," June 2007.

[70] *Fox Television Stations*, 489 F.3d at 465.

[71] Perhaps this helps explain why only 16% of parents say they have "ever used" the V-Chip to block specific TV content. *See*, "Parents, Children & Media," June 2007, p.10.

[72] *See, e.g.*, Executive Summary, "The Ratings Sham II," www.parentstv.org (2007).

[73] CRS Report for Congress, "V-Chip & TV Ratings: Monitoring Children's Access to TV Programming," Congressional Research Service, Updated, May 2, 2005, CRS-3.

those with screens under 13") are not equipped with a V-chip; and radios do not come with V-chips.

In the case below, the Court of Appeals also pointed out that "'cable systems have the capacity to block unwanted channels on a household-by-household basis.'"[74] While cable systems do permit subscribers to block channels, most of these channels come as part of basic channel packages that subscribers have no choice putting together; and with so many channels now offered on cable and satellite TV systems,[75] it is unrealistic to expect parents to know in advance[76] which channels now or in the future may air indecent content. There is also a possible drawback when parents block an entire channel to shield children from some of its programming. Other worthwhile programming may also be blocked. Imagine, for example, blocking all major broadcast TV network channels because some programs contain indecent language.

It is also unrealistic to put the whole burden on parents. For a variety of reasons, many parents will not use the V-Chip or other technology intelligently or at all. Those reasons include: difficulty using the technology; parental concerns

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[74] *Fox Television Stations*, 489 F.3d at 466.

[75] Nielsen Media Research, "Average U.S. Home Now Receives 104.2 TV Channels," Mar. 19, 2007.

[76] *Pacifica*, 438 U.S. at 748-749 ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected ... content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").

about over-blocking; parental language barriers; parental disabilities; parental fear of negatively affecting their relationship with a child; parental naiveté (as in, "My child wouldn't be interested in that"); and neglect.

Amicus would also respectfully contend that *United States v. Playboy*[77] was wrongly decided for several reasons. First, the *Playboy* Court held in effect that when it comes to cable TV, "the First Amendment rights of an intruder" "plainly outweighs" "the individual's right to be left alone."[78] And in the *Playboy* case, the Petitioner was a most unwelcome intruder. In homes all across the nation, the imperfectly scrambled signals for pornographic films were bleeding into the homes of non-subscribers. Under the law, either the home is a special place or it isn't; and if is special, an intruding pig is still an intruding pig regardless of whether it travels by air or wire.

Second, the *Playboy* Court held in effect that when it comes to cable TV, it is alright to expose children to pornography as long as caring parents can plug up the smut after exposure. Petitioner in the *Playboy* case did not establish and could not have established that parents were and would always be made aware of a bleeding problem, before their children discovered it. In so holding, the *Playboy* Court ignored a principle enunciated in *Ginsberg v. New York*:

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[77] 529 U.S. 803 (2000).

[78] *Pacifica*, 438 U.S. at 748.

> First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society...The legislature could properly conclude that parents...are entitled to the support of laws designed to aid discharge of that responsibility.[79]

Third, the *Playboy* Court held in effect that when it comes to cable TV, it is alright to expose children to pornography as long as parents have a means by which they can plug up the smut, either before or after exposure, even if many don't make use of that means for one reason or another.[80] Petitioner did not establish and could not have established that all parents would become aware of a bleeding problem and block channels when they became aware. In do so doing, the *Playboy* Court ignored yet another principle enunciated in *Ginsberg v. New York*:

> The State also has an independent interest in the well-being of its youth..."While the supervision of children's reading habits may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify

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[79] 390 U.S. 629, at 639 (1968).

[80] Those reasons include language barriers, inability to read, disability, naive and neglect.

> reasonable regulation of the sale of material to them."[81]

Fourth, by applying "strict scrutiny" to a needed law that was intended to restrict children's access to content that is not constitutionally protected for children, because the law incidentally burdened adult access, the *Playboy* Court also turned a deaf ear to the warning enunciated in *Columbia Broadcasting System v. Democratic National Committee*:

> Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress... Professor Chafee aptly observed: "Once we get away from the bare words of the Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as to not cripple the regular work of government."[82]

There are at least two problems with the application of the "strict scrutiny" standard in the *Playboy* case. First, it is disingenuous for the Supreme Court to say that obscene content is unprotected speech for minors[83] and that the

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[81] 390 U.S. at 640 (quoting *People v. Kahan*, 206 N.E.2d 333, 334 (N.Y. 1965)).

[82] 412 U.S. 94, at 102-103 (1947).

[83] *Ginsberg*, 390 U.S. at 636–37 ("It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York . . . to accord minors under 17 a

government has a compelling interest in protecting children against such content[84] and then to say that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible."[85]

The word "compel," as defined in *Webster's New Collegiate Dictionary,*[86] means: "1 to drive or urge forcefully or irresistibly 2 to cause to do or occur by overwhelming pressure." If a governmental interest is truly "compelling," then other interests (including those grounded in the First Amendment) must yield, at least to some extent. But judging from the *Playboy* decision, rarely will a law intended to protect children from harmful content withstand scrutiny, if the law in any way burdens adult access.

Second, there is or certainly ought to be a difference between a law that is intended to ban or restrict adult access to content that is presumptively protected for adults,[87] and a law that only incidentally burdens adult access to such speech when the law's primary intention is to shield

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more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.").

[84] *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.")

[85] *Playboy*, 529 U.S. at 818.

[86] WEBSTER'S NEW COLLEGIATE DICTIONARY, 227, (1981).

[87] *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (applying strict scrutiny and holding unconstitutional a statute limiting political speech in front of embassies).

children from content that is harmful to children and to which their access is not protected. For the latter type of law, the appropriate level of scrutiny should be intermediate scrutiny.

Amicus would point out that federal courts did not apply "strict scrutiny" when evaluating the constitutionality of laws that restrict the display of harmful to minors material in retail stores. As the Eleventh Circuit put it in *American Booksellers v. Webb*:[88]

> We are content to note that (1) content-based restrictions on speech survive constitutional scrutiny only under extraordinary circumstances; but (2) material judged "obscene" under the appropriate constitutional standard is not protected by the First Amendment; (3) indirect burdens placed on protected speech in an effort to regulate obscenity must be supported by important state interests and should not be unnecessarily burdensome; and (4) the state's interest in protecting its youth justifies a limited burden on free expression.

Amicus would also point out that as a result of the *Playboy* decision there are still no enforceable federal or state laws that require persons who commercially distribute pornography on the Internet

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[88] 919 F.2d 1493, 1500-1501 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991).

to take reasonable steps to restrict children's access to the material.[89]

VI. THE FCC'S INDECENCY ENFORCEMENT SCHEME DOES NOT THREATEN THE FIRST AMENDMENT

Whether a majority of Justices agreed with him or not, Justice Stevens got it right when he wrote in the plurality opinion in *Pacifica*:

> A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by use of less offensive language.[90]

As this Court has pointed out on more than one occasion, the purpose of the First Amendment is to protect "ideas," not vulgar or lewd descriptions or depictions of sexual or excretory activities or organs. As the Court stated in *Miller v. California*:

> The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and

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[89] *See generally*, Robert Peters, "It Will Take More than Parental Use of Filtering Software to Protect Children from Internet Pornography," 31 *N.Y.U. Rev. L. & Soc. Change* 829 (2007).
(The article argues that while laws alone can protect children from Internet pornography, laws will be necessary and that the courts should apply intermediate rather than strict scrutiny to the Child Online Protection Act).

[90] 438 U.S. at 743, n.18.

> political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press..." *Breard v. Alexander*, 341 U.S. at 645..."The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people," *Roth v. United States, supra*, at 484 (emphasis added)....[91]

As the Court also pointed out in *Bethel School District v. Fraser*:[92]

> In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body...likewise provides that "[no] person is to use indecent language against the proceedings of the House"...The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order...Senators have been censured for

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[91] 413 U.S. 15, at 34-35 (1973).

[92] 478 U.S. 675, at 681-682 (1986).

> abusive language directed at other Senators... Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?

To their credit, most mainstream daily newspapers still have rules against use of "four-letter" words. Either they do not print these words at all or they use symbols like, @#%, to represent the words or they skip letters, as in "s··t." And on the whole, our nation's daily newspapers do a far better job of keeping the pubic informed about matters of public importance than anything found on broadcast TV these days, with the possible exception of PBS.

Television and radio also have a technique for allowing their audience to understand that someone has used a four-letter word, without actually repeating it. It's called "bleeping," and in most instances "bleeping" is a satisfactory way to handle cursing in the broadcast media. As a result of federal court decisions in the 1980s and 1990s, broadcasters also have another means by which they can handle cursing or swearing – namely, airing the programming after 10 p.m.

Furthermore, just because the FCC insists that it must have authority to sanction use of single expletive, depending on circumstances, doesn't mean it intends to sanction every expletive. The Commission also considers "serious value" an important factor in determining whether content is

"indecent." The Court below criticized this policy,[93] but the indecency definition, like the obscenity definition, is an attempt to find a balance between governmental interests (e.g., protecting the privacy of the home and children) and freedom of speech. In cases where content has the power both to offend and to inform, society may at times choose to tilt the balance in favor of informing (freedom of speech), even though harm can still result.

CONCLUSION

For all of the above reasons, your *Amicus* prays that this Honorable Court reverse the judgment of the court below and declare that the FCC's policy regarding "fleeting expletives" is not arbitrary and capricious under the Administrative Procedure Act.

Respectfully submitted,

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[93] *Fox Television Stations*, 489 F.3d at 458-459.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

Federal Communications Commission, *et al.*

Petitioners,

v.

Fox Television Stations, Inc. *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* PARENTS TELEVISION COUNCIL IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Parents Television Council (PTC) is a nonprofit, nonpartisan, grassroots organization dedicated to improving the content of entertainment programming, with an emphasis on prime time television. Founded in 1995, PTC is funded by contributions from its 1.1 million members and other supporters throughout the United States. It works with television producers, broadcasters and sponsors in an effort to stem the increasing tide of harmful messages targeted at children.

PTC has encouraged elected and appointed government officials and agencies to enforce broadcast decency standards that exist in statute and regulation, and it has encouraged its members and others to file complaints with the FCC about broadcasts they believe violate the indecency law, including the broadcasts at issue in this case. Many of the complaints filed with the FCC about the 2002 and 2003 Fox broadcasts came from PTC members. PTC participated as *amicus curiae* in the Second Circuit proceeding below.

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[1] As required by Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that all parties have consented in writing to the filing of this brief.

STATEMENT OF THE CASE

PTC adopts the Petitioner's Statement.

INTRODUCTION AND SUMMARY OF ARGUMENT

PTC disagrees with the petitioners that the proper disposition of this case is for the Court to reverse the decision below and to remand the case for further proceedings. PTC contends that the Court should, for the reasons urged by petitioners, first reverse the Second Circuit's decision. It should then consider respondents' constitutional challenges to the FCC's change in policy regarding isolated expletives during times when children are likely to be in the television audience, as embodied and reiterated in its Remand Order. *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, In re* 21 F.C.C.R.13311 (November 6, 2006).

The question presented is broad enough to embrace the constitutional issues raised by respondents below and addressed by the Second Circuit. PTC recognizes that the Second Circuits decision purported to deliver as mere dicta its view that the FCC's new enforcement policy is unconstitutional. But by addressing the constitutional question, including its survey of the Court's jurisprudence in the area of indecency regulation and wondering aloud about the continuing viability of the Court's holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Second

Circuit has invited review by this Court. The Second Circuit also made clear that no matter what the FCC did by way of trying to cure the purported defects in its enforcement policy, that court believed that enforcement of 18 U.S.C. ¶ 1464 relating to indecency was an outdated notion.

Respondent NBC argued in its opposition to petitioners' brief seeking a writ of certiorari that if certiorari were granted, then the Court would necessarily have to consider NBC's constitutional challenges to the FCC's new enforcement policy. NBC's Brief in Opposition (Br. Opp.) at 27-28. If NBC meant what it said, then it will doubtless brief its constitutional arguments to the Court and respondents can reply. In view of the Second Circuit's broad pronouncements concerning what it sees as the constitutional infirmities of the FCC's Remand Order, there is little point in remanding this case. For the Second Circuit has made clear its dim view of the constitutionality of the Remand Order.

PTC therefore urges the Court to consider whether *Pacifica* is still good law and, by extension, whether Section 1464 still means what it says when it comes to indecency.

The Court has observed in another context that "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *Turner Broadcasting,* 512 U.S. 622, 663 (1994) (quoting *United States v. Southwestern Cable Co.,* 392 U.S. 157, 177 (1968)). The record in this case shows that

that is still true. The Court has also held that one who has been granted a license to broadcast over scarce public airwaves serves in a sense as a fiduciary for the public. *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984). The Court should decide whether *that* proposition is still true.

In 1978, this Court held in *Pacifica* that because of the broadcast media's pervasive scope, intrusive nature and accessibility to children, the FCC could constitutionally regulate the broadcast of indecent material. NBC contemptuously refers to *Pacifica* and its supporting precedent as "moth-eaten." NBC Br. Opp. at 30 and 32 n.9. NBC seems to believe that Pacifica is an outdated artifact of a different time that should now be put aside.

The times may be different, but the salient facts in *Pacifica* and in this case are the same.

- Broadcast television is still a uniquely pervasive influence in America, it is still uniquely accessible to children, and it still confronts the viewer in the privacy of the home.

- The FCC's action under review here is not a ban on broadcasting, only a channeling of certain kinds of language to a time when children are less likely to be watching and listening. The same was true in *Pacifica*.

- Here, as in *Pacifica*, the order at issue is from an agency with long experience in the area being regulated and it is declaratory, not punitive.

The FCC has not levied any penalty against Fox arising out of the 2002 and 2003 broadcasts.

· And, of course, here and in *Pacifica* the broadcast medium is one that traditionally has been afforded less First Amendment protection than others.

All of those facts were important to the holding in *Pacifica*, and all of them are present in this case.

Technology does not trump Section 1464. V-chip technology is not an effective bulwark against indecent broadcasting. Studies show that v-chip technology is little known and less understood by parents, and that the ratings assigned to programming are driven by the need for advertising revenues, rather than the true content of programming. The 2002 and 2003 Fox broadcasts at issue in this case, for example, were mislabeled and given a far weaker label than they merited.

Broadcasters are not unfairly put upon by not being able to broadcast whatever they want until after 10 p.m. each day. Nor are they really at a competitive disadvantage with cable; they own significant portions of the cable spectrum and therefore control-and sometimes even create–the very cable content that they contend so disadvantages them as broadcasters. They cannot with a straight face point to their often coarser fare on cable as a reason to permit them to do the same on broadcast television.

Broadcasters also often contend with a shrug that their programming is no more objectionable than what children can hear in other venues, including the internet and cable television. That there is racy fare available elsewhere in the media world does not mean that it must be available on the public airwaves at times when children are likely to be watching.

All the FCC has done in this case is to insist that Fox not broadcast four-letter vulgarities on prime time television to an audience it knew would include large numbers of children. This case is not an affront to artistic expression or a threat to the First Amendment. Instead, it is about whether Section 1464 is to have any continuing vitality in affecting what the broadcasters can send into America's homes, or whether, as respondents seem to argue, the indecency statute is a polite fiction that can be safely ignored.

ARGUMENT

I. The NBC and Fox Broadcasts Show How Lightly Respondents Take Their Obligations To Avoid Broadcasting Indecent Material

In 2001, faced with a rising tide of complaints about offensive television broadcasting, the FCC issued a policy statement aimed at helping the broadcast industry avoid violations of Section 1464. *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement*

Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 (March 14, 2001) (*Industry Guidance*). That *Guidance* made clear that fleeting expletives, in context, could violate Section 1464. *Id.* at 8008-8009 ¶¶ 17, 19.

NBC ignored the FCC's *Industry Guidance*. In January 2003 it broadcast the Golden Globe Awards. The singer Bono won an award and in his acceptance speech, he said, "This is really, really fucking brilliant. Really, really great." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 19 F.C.C.R. 4975, 4976 (March 18, 2004). The FCC found that in context Bono's comment was indecent, but it did not impose any sanction on NBC because its prior administrative precedent indicated that a fleeting broadcast of a single expletive like that at issue was not indecent. *Id.* at 4980-82 ¶¶ 12, 15.

Fox, too, ignored the *Industry Guidance*. On December 9, 2002 it broadcast the Billboard Music Awards, which aired at 8 p.m. on the East Coast. The entertainer Cher received an award and during her acceptance speech she taunted her critics, and concluded, "People have been telling me I'm on the way out every year, right? So fuck 'em. I still have a job and they don't." Petitioner's Appendix (Pet. App.) 116a ¶ 56. FOX gave its 2002 broadcast only a TV-PG (parental guidance suggested) rating.[2] According to Nielsen ratings data, just under 28% of

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[2] An explanation of Fox's ratings system is found in the FCC's Remand Order. Pet. App. 77a n.47 ¶ 18.

the almost 10 million viewers of the 2002 Billboard Music Awards were under 18, and 12.7% of those were between the ages of 2 and 11. *Id.* at 119a ¶59. The bland rating that Fox assigned to that broadcast would not have alerted parents that their children might be exposed to Cher's foul language. Fox did not contend before the FCC that Cher's use of the F-word was in any way justified, or that it had some inherent artistic value. *Id.* at 119a-120a

The next year, almost to the day, Fox again broadcast the Billboard Music Awards, again in prime time, at 8 p.m. on the East Coast. And again it broadcast the same word that Cher had used the year before, and another to boot. This time, Paris Hilton and Nicole Richie, the stars of a show called "The Simple Life," were teamed to present an award. Fox's script writers teased the audience about Cher's expletive of the year before on the same show by having Ms. Hilton warn Ms. Richie to "watch the bad language." "It feels so good to be standing here tonight," Ms. Hilton continued. Without missing a beat, Ms. Richie replied, "Yeah, instead of standing in mud and [audio blocked]. Why do they even call it 'The Simple Life'? Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." Pet App. 70a-71a ¶13. Fox conceded before the FCC that Nicole Richie's language during the 2003 broadcast did not have any artistic merit and did not convey any message. *Id.* at 76a n.44.

Again, according to the Nielsen ratings, the audience included a significant number of viewers under 18 (23.4%) and a large audience between the ages of 2 and 11 (11%). Pet. App. 76a ¶18. And

again, despite its experience the year before with Cher, Fox mislabeled its program. It had upped its rating from TV-PG, which it used for its 2002 broadcast, to TV-PG(DL), the "D" meaning that the program may contain some suggestive dialogue, the "L" that it may contain some infrequent coarse language. *Id.* 77a ¶18 n. 47. There was nothing *suggestive* about Ms. Richie's language; it was explicit. And her comments can only charitably be described as coarse.

Fox knew what was likely to happen. In the course of three episodes of "The Simple Life" it broadcast in the days leading up to the 2003 Billboard Music Award show, Fox had had to bleep Ms. Richie nine times. *Id.* 92a ¶33. Fox was on notice that, as she so often did on "The Simple Life," Ms. Ritchie would likely "go blue" on the air. It knew there was a good chance that Ms. Richie would use vulgar language because it caught the first expletive; why not the other two?

II. Broadcast Television Is Still Uniquely Pervasive and Uniquely Accessible To Children

The holding in *Pacifica* was bottomed on the broadcast media's pervasiveness and accessibility to children. 438 U.S. at 748-49. The broadcasters appear to believe that *Pacifica* is a stray outlier in First Amendment jurisprudence that is now irrelevant and should be put aside. Not so. The special place that broadcasting occupies in the media universe has been noted by the Court in the years since *Pacifica*. *See Turner Broadcasting Sys., Inc. v.*

FCC, 512 U.S. at 637 ("[O]ur cases have permitted more intrusive regulation of broadcasters than of speakers in other media") and *Reno v ACLU*, 521 U.S. 844,868 (1997) (noting "special justifications for regulation of the broadcast media that are not applicable to other speakers," citing *Pacifica*).

What then has changed since *Pacifica*, *Turner Broadcasting* and *Reno* that the Court should now overrule *Pacifica*? Not much, when it comes to the broadcasters' dominance over other media.

The FCC recognized in its Remand Order the reality that broadcast television remains as uniquely pervasive in the lives of Americans, and as uniquely accessible to children, as it was when the Court decided *Pacifica*. In 2003, the FCC found, more than 98% of households had at least one television set and despite the fact that many of those with televisions - almost 86% - subscribe to a cable or satellite service, more than 15 million do not and rely exclusively on broadcast television. Moreover, a significant number of cable and satellite subscribers receive broadcast television through their subscriptions. Pet. App. 106a-107a ¶ 149; in addition, some 68% of children between the ages of eight and 18 have a television set in their bedrooms, and almost half of those are broadcast-only. *Id.*

Broadcast television's pervasiveness can be seen as well in the huge advantage it has in viewership when compared to cable and satellite. In September 2006, each of the top ten broadcast programs had more than 15 million viewers; only one cable program had even 5 million viewers. *Id.* at

108a ¶ 50. During the 2004-2005 season, of the 495 most-watched programs, 485 of them were on broadcast television and the highest-rated cable program rated only 257 on the list of most-watched programming. *Id.* With broadcasting that far ahead of its competition, it is safe to say that it is not only pervasive; it is uniquely pervasive. And for the same reason, it is still uniquely accessible to children.

Simply put, broadcast programming saturates the nation's airwaves and dominates what is seen and heard in the nation's homes, particularly by children. That is why, despite their claims that they are besieged on all sides by viewing and listening alternatives on the internet and elsewhere, none of the broadcasters has chosen to abandon the free public airwaves.

III. Technology Should Not Relieve Broadcasters Of Their Obligations Under Section 1464

The broadcasters argue that viewers who do not want to avoid indecent programming can avoid it with the use of a technology filter. They have it backwards. Section 1464 addresses broadcasting, not receiving. That statute should not be disposed of by making viewers fend for themselves so that broadcasters can have a free hand with the public airwaves.

By putting the onus of Section 1464 on the broadcasters, Congress chose the simplest and most direct way of addressing the problem of broadcast indecency. Congress did not leave the viewing public

to look out for itself. A technological solution at the viewers' end – if it worked, and it does not · shifts the problem of broadcast indecency from the broadcasters to the public, and effectively reverses the power flow of Section 1464 from a restriction on broadcasters to a burden on viewers and listeners.

The Court in *Pacifica* noted the intrusive nature of broadcasting, commenting that it comes into the privacy of the home, "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748.[3] The Court has made the same point in other cases. *See Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738 (1970) (right to avoid unwelcome speech has special force in the privacy of the home); and *Frisby v Schultz*, 484 U.S. 474, 485 (1988) ("We have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.").

Those observations are particularly pertinent here. The ratings that Fox assigned to the 2002 and 2003 broadcasts were inadequate to warn parents that their children were at risk of being subjected to gratuitous expletives on prime time television. There is no reason why viewers should have to filter broadcasters' fare against indecency, and every

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[3] In his concurrence in *Pacifica*, Justice Powell put it this way: "broadcasting – unlike most other forms of communication – comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds." 438 U.S. at 759 (citations omitted).

reason why the broadcasters should do the job themselves, as Congress intended.

Enforcement of the FCC new policy will not be the death of live television. Broadcasters can and should use technology at their end, by delaying the broadcast of live events 10 seconds or so, or however long is necessary, in order to ensure that they do not violate Section 1464. If broadcasters took Section 1464 seriously, they would do so already for the broadcast of award shows, which have proven to be unpredictable and troublesome.

In addition to the fact that a technology "solution" turns the Congressional regulatory scheme on its head, the technology available does not work. The so-called v-chip technology[4] is only as good as the rating system it is based on, and that system is bad. The best evidence of that are the inaccurate underratings Fox gave to its 2002 and 2003 broadcasts. Moreover, among those parents who have heard of the broadcasters' ratings system, most do not understand what they mean. Kaiser Family Foundation Survey, *Parents, Children & Media,* June 2007 at 8.

The FCC's Remand Order noted that the "TV-PG" rating is the most common rating given by the broadcasters to their programming, covering a majority of programming. That rating means that a program may contain material that parents find unsuitable for younger children, and that parents

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[4] V-chip technology is explained in the Second Circuit's decision below. Pet. App. 42a n.14.

may want to watch that program with their children. Pet. App. 77a n.47. That the majority of broadcast television programming carries a rating that suggests parental supervision is a telling indictment of what the broadcasters are sending into the nation's living rooms. Put another way, if the broadcasters have accurately rated their programming, then, by their own estimation, the majority of what they broadcast must be watched with caution by children. That is a telling indicator of the continuing need for *Pacifica* and ready enforcement of Section 1464.

Broadcasters' increasing indifference to the constraints of Section 1464 in recent years prompted Congress, over the objection of the broadcasters, to put real teeth in the statute when it significantly increased the penalty for broadcast indecency. *See* Broadcast Indecency Enforcement Act of 2005, Public Law No. 109-235, 120 Stat. 491. Congress acted with near unanimity. The Senate passed the Act unanimously and in the House, it passed 379-35; the President signed it a week later.[5] Respondents should not be allowed to end-run Congress by placing the burden on parents try to avoid their children being exposed to gratuitous expletives during prime time.

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[5] http://www.govtrack.us/congress/bill.xpd?bill=s109-193

IV. The FCC's Enforcement Of Section 1464 Does Not Meaningfully Restrict The Rights Of Broadcasters

The FCC's new enforcement policy is not about *whether* broadcasters can ever broadcast expletives or other indecent speech; it is about *when* they can do so. Respondents can broadcast the very language at issue here - and more - at other times and in other places. All the FCC is trying to do is channel indecent broadcasts away from the 6 a.m. to 10 p.m. time period. 47 C.F.R. 73.3999(b). Moreover, Fox and the other respondents all own cable channels on which they can broadcast whatever they want, whenever they want. Their websites show that Fox owns 16 cable channels; ABC owns 10; CBS owns at least two; and NBC owns nine cable channels.[6]

All the Remand Order required was that respondents restrain themselves during the times when children are most likely to be watching television. That was a reasonable restriction in *Pacifica*, and it is still reasonable.

Conclusion

In 2003, Fox broadcast live and unfiltered a celebrity who it knew was inclined to utter

[6] Fox: http://www.newscorp.com/operations/cable.html; ABC: http://corporate.disney.go.com/careers/who_abc_cable.html; CBS: http://www.cbscorporation.com/our_ company/divisions/cbs_corporation/index.php; NBC: http://www.nbc.com /nbc/NBC_ Universal_Cable_Networks/

unscripted expletives; it knew from past Nielsen ratings that large numbers of viewers under the age of 18 would be watching; and it underrated the broadcast so that parents had no reason to expect that they would be subjected to prime time crudity like that gratuitously uttered by Ms. Richie.

Technology cuts both ways. There is no reason why the broadcasters cannot impose a brief time delay in their live broadcasts in order to avoid unscripted vulgarities. After all, Fox's 2002 and 2003 broadcasts were delayed by one hour in the Mountain time zone and three hours in the Pacific time zone. Pet. App. 95a ¶ 36. A 10-second delay should not be an onerous burden in order to give meaning to Section 1464.

The Court should uphold the FCC's new enforcement policy contained in the Remand Order as constitutionally valid under the holding of *Pacifica*.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PUBLIC BROADCASTERS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae, the Public Broadcasting Service ("PBS"), the Association of Public Television Stations ("APTS"), National Public Radio, Inc. ("NPR"), and a host of public television producers and broadcasters, are leaders of the public broadcasting community.[1] For almost 40 years, amici have produced, distributed, and broadcast award-winning programming that addresses issues of public concern, including social, political, and historical events that play a pivotal role in shaping American culture and society.

Public broadcasters are subject to regulation under the Federal Communications Commission ("FCC") indecency policy that is before the Court. One amicus received a Notice of Apparent Liability from the FCC, alleging that a program it broadcast contained language that was indecent and proposing a monetary forfeiture as a penalty for broadcasting the program. Other public broadcasters have been the subject of indecency investigations by the FCC, and amici collectively dedicate substantial resources to efforts to understand and comply with the

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[1] Each party has consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. A list of the amici who are filing this brief is included in the Appendix.

indecency policy, while fulfilling their fundamental obligation to serve the public interest.

The FCC historically has taken a "cautious[]" and "restrained" approach to indecency enforcement. *See FCC v. Pacifica Found.*, 438 U.S. 726, 761 n.4 (1978) (Powell, J., concurring in part and concurring in the judgment) (citing Brief for Petitioner at 42-43 & n. 31); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n. 14 (D.C. Cir. 1988). Recently, however, the agency has adopted a less restrained policy that it has failed to justify and that has produced arbitrary results. Amici submit this brief to describe the adverse effects of this policy, which amici believe is arbitrary and capricious and unconstitutional.

STATEMENT

For generations, Congress and the American people have relied on the nation's public broadcasters to provide programming that "address[es] issues of national concern and solves local problems." 47 U.S.C. § 396(a)(8). Congress thus encouraged public broadcasters to develop "programming that involves creative risks" and recognized that public broadcasters' success would "depend on freedom, imagination, and initiative on both local and national levels." 47 U.S.C. §§ 396(a)(3), 396(a)(6).

Some of the most highly acclaimed programming in the country is broadcast, for example, on public television. During the 2007-2008 season, PBS and its programming received 29 Emmy Awards, including 10 News & Documentary Emmys,

putting PBS ahead of all broadcast and cable networks for the seventh consecutive year. During the 2007-2008 award year, PBS and its producers also received eight George Foster Peabody Awards, fourteen Parents Choice Awards, one Golden Globe nomination, and one Academy Award, among many others. *See* PBS, "PBS Awards," *at* http://pbs.org/aboutpbs/aboutpbs_awards.html (Apr. 2008).

Public television continues to be widely viewed by the American public. PBS reaches nearly 73 million people each week through its on-air and online programming. PBS, "PBS: An Overview," *at* http://pbs.org/aboutpbs/aboutpbs_corp.html (Jul. 2007). A national Roper survey rated PBS and its member stations the country's most trusted public institution. Press Release, PBS, "New National Roper Poll Ranks PBS As Leader in Public Trust," *at* http://pbs.org/aboutpbs/news/20050216_roperpoll.html (Feb. 16, 2005).

Amici work hard to achieve these results and meet their obligation to offer programming responsive to the needs of their communities. Federal law requires most public broadcast stations that receive federal funding (except for certain government-owned and operated stations) to establish community advisory boards to provide input on the programming broadcast by their local stations. *See* 47 U.S.C. § 396(k)(8)(A). Public broadcasters also have a financial incentive to provide programming that serves community needs: Congress recognized in 1992 that "private contributions of $6.1 billion since 1972 constitute the

largest source of support for public television." Cable Television Consumer Protection & Competition Act of 1992, House Comm. on Energy & Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. 69. Public broadcasters' reliance on private donations means that their success is tied directly to viewers' satisfaction. *See id.* (magnitude of private contributions indicates "the success of public television in serving the needs and interests of local communities").

To fulfill its statutory mission, public broadcasting must focus on the pivotal artistic, scientific, historic and social issues of our time, and it must report on these issues in a way that faithfully reflects their social implications, even when they are controversial or disturbing.

The FCC's new, aggressive enforcement policy, which lacks clear and consistent standards, undermines public broadcasters' ability to fulfill their public interest mission. Coupled with the crippling increase in potential indecency forfeitures, the uncertain legal terrain that amici must now traverse has forced them to engage in self-censorship to avoid potentially catastrophic financial consequences.

A. The FCC's Historic Approach to Indecency

The indecency statute dates to the Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1173 (codified as amended at 18 U.S.C. § 1464), but the FCC did not engage in active indecency enforcement until the 1970s, and, even then, actions were rare. *See*

Eastern Educ. Radio (WUHY-FM), 24 F.C.C.2d 408 (1970). The scope of the FCC's authority was challenged in 1975 when it found that a radio station had violated the indecency statute by broadcasting George Carlin's "Filthy Words" monologue. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

In its *Pacifica* decision, the Commission indicated that it intended to play a limited role in the regulation of content and that "the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes." *Citizen's Complaint Against Pacifica Found.*, 56 F.C.C.2d 94 ¶ 16 (1975). This Court narrowly upheld the FCC's decision as applied to the broadcast of the Carlin monologue, and two of the five justices who voted to uphold the decision did so on the express assumption that the agency would "proceed cautiously, as it has in the past." *Pacifica*, 438 U.S. at 761 n.4 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment); *id.* at 760-61 (distinguishing the "isolated use of a potentially offensive word" from "the verbal shock treatment administered by [the] respondent").

In the wake of *Pacifica*, the FCC assured broadcasters that it "intend[ed] strictly to observe the narrowness of the *Pacifica* holding." *WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶ 10 (1978). Accordingly, it denied a complaint against a public television station that broadcast the word "shit," as well as other "sexually-oriented" content in the *Masterpiece Theatre* series and other programs, finding that the case before it did not resemble the "verbal shock treatment" in *Pacifica* and was

therefore "clearly . . . distinguishable." *Id.* The FCC emphasized that it would "construe the *Pacifica* holding consistent with the paramount importance we attach to . . . editorial discretion by broadcasters" *id.* at ¶ 11, and that it did not intend "to inhibit coverage of diverse and controversial subjects by licensees, whether in news and public affairs or in dramatic or other programming contexts," *id.* Speaking to a group of broadcasters shortly after *Pacifica*, the chairman of the FCC, Charles Ferris, declared, "*We at the FCC are far more dedicated to the First Amendment premise that broadcasters should air controversial programming than we are worried about an occasional four-letter word.*" Charles Ferris, Chairman, FCC, Address Before the New England Broad. Ass'n, at 8 (Jul. 21, 1978).

The FCC's restrained approach continued over the succeeding decades. In 1991, for example, the agency denied a complaint involving an NPR broadcast of a wiretapped telephone call in which gangster John Gotti uttered ten variations of the word "fuck" in rapid succession during NPR's *All Things Considered* news program. *Peter Branton*, 6 F.C.C.R. 610 (1991). Observing that "the program segment, when considered in context, was an integral part of a bona fide news story," *id.* the Commission concluded that the language was not "patently offensive," and therefore not indecent. The FCC further observed that it "traditionally ha[s] been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming." *Id.*

In 2001, the FCC issued a policy statement that described the standard it uses in indecency cases and provided examples in which the agency had previously applied this standard. *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C.R. 7999 (2001) ("*Policy Statement*"). According to the *Policy Statement*, material is indecent if it (1) "describe[s] or depict[s] sexual or excretory organs or activities," and (2) is "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Id.* at 8002. Applying a national community standard, the FCC determines patent offensiveness by considering three factors: whether the material (1) is explicit or graphic in its description of sexual or excretory organs or activities; (2) dwells on or repeats at length the description; and (3) appears to pander, is used to titillate, or is presented for shock value. *Policy Statement*, 16 F.C.C.R. at 8003.

With respect to the second factor, the FCC drew a distinction between "fleeting and isolated" uses of coarse language, which generally would not be found indecent, and a "persistent focus on sexual or excretory material," which "exacerbate[s] the potential offensiveness of broadcasts." *See id.* at 8008-09. Consistent with this approach, the FCC's Enforcement Bureau held in 2003 that a singer's fleeting statement that his winning of a Golden Globe Award was "really fucking brilliant" was not indecent because it did not satisfy the first prong of the indecency standard—that is, it "did not describe sexual or excretory organs or activities," but instead was used to "emphasize an exclamation." *Complaints Against Various Broadcast Licensees*

Regarding Their Broadcast of the "Golden Globe Awards" Program, 18 F.C.C.R. 19859, 19861 (2003). The Bureau noted further that it had "previously found that fleeting and isolated remarks of this nature do not warrant Commission action." *Id.*

B. The FCC's New Indecency Policy

In 2004, the FCC departed from its longstanding policy by reversing the Bureau's decision, finding that the word "fuck" and its variations "inherently ha[ve] a sexual connotation" and thus, regardless of context, "depict or describe sexual activities." *Complaints Against Various Broadcast Licensees Regarding Their Broadcast of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4979 (2004) (*"Golden Globe"*). Under the new standard, any use of the word "fuck" appears to satisfy not only the first prong of the indecency test, but also the first patent offensiveness factor. That is because, according to the FCC, "[t]he 'F-Word'" "invariably invokes a coarse sexual image." *Id.* In addition, because even "isolated or fleeting" uses of coarse language may be indecent, a broadcaster could be liable even if the broadcast does not "dwell on or repeat" the (ostensible) depiction of sexual or excretory activity.

Following *Golden Globe*, the third patent offensiveness factor—whether the material is presented to pander or titillate or for shock value—became the key to determining liability for broadcasts of expletives. In applying that factor, the FCC has made clear that, outside the context of "news programming," *see In the Matter of Complaints*

Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299, 13327 (2006) (*"Remand Order"*), the burden is now on the broadcaster to convince the FCC that the use of an expletive is "necessary" to convey the program's message, *see* Joint App. 24-179, 73 (*"Omnibus Order"*).

The expansion in the scope of the FCC's definition of indecency was evident in the FCC's 2006 *Omnibus Order*. In that decision, the FCC found that a public television station's 2004 broadcast of a Martin Scorsese documentary, "The Blues: Godfathers and Sons," which concerned the growth of blues music in Chicago, was indecent because industry leaders used coarse language on eight occasions during interviews. *Id.* at 70-79 & n.111. Among others, the documentary profiled Marshall Chess. Chess's father, Leonard, was a Polish immigrant who learned to speak English in Chicago's black community as a teenager and was later inducted into the Rock and Roll Hall of Fame for co-founding Chess Records, the company that catalyzed Chicago blues.

The FCC based its finding that the documentary was indecent on variations of the word "fuck" that were spoken by Marshall Chess and the word "shit" spoken by hip-hop artists. Chess used expletives in recounting his father's relationship with blues artists. Among other quotes, Chess stated, "[M]y dad had so many people at his funeral, my uncle said, 'You see all those motherfuckers? They're coming to make sure he's dead, so they don't

have to pay back those motherfuckin' notes.'" *Id.* at 74 (quoting *The Blues*).

In another scene, the documentary showed hip-hop artists in a record store with Chess. During the scene, one artist states, "'I'll buy some shit," and another states, "This looks crazy! See that? This is the kind of shit I buy! I mean, my man is wearing pink gear—that shit, that shit is crazy right there! I'm buyin' it!'" *Id.* (quoting *The Blues*).

Although Commissioner Jonathan Adelstein found that the language was important to "convey the reality of the subject of the documentary," Joint App. 173 (statement of Comm'r Adelstein, concurring in part and dissenting in part), the FCC concluded that the language violated its indecency policy. The FCC first found that the word "shit," like the word "fuck," automatically satisfies the first prong of its indecency test and the first patent offensiveness factor because it "invariably invokes a coarse excretory image." Joint App. 73. Applying the second patent offensiveness factor, the FCC found that the expletives were "numerous" and "repeated." *Id.*

As for the third factor, the FCC concluded that the language was "shocking" because "we disagree that the use of such language was necessary to express any particular viewpoint" and because "many of the expletives in the broadcast are not used

by blues performers," but instead by hip-hop performers and a leading record producer. *Id.*[2]

C. The Adverse Effects of the FCC's New Policy

For years, PBS and public broadcasting producers have reviewed programming to identify content that some viewers may find objectionable. When they identify such content, these broadcasters may edit the programming to delete the content, retain the content but warn viewers and member stations, or offer multiple versions of the programming to member stations. This approach allows each local station to make choices that are tailored to its viewers' tastes.

The FCC's policy shift, combined with a recent increase in the maximum monetary forfeiture for uttering a single expletive from $32,500 to $325,000 per station, *see* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006),

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[2] In contrast, the FCC rejected an indecency challenge to the broadcast of the film "Saving Private Ryan" because it concluded that expletives—the same words that the FCC found indecent in "The Blues"—were "[e]ssential . . . to convey to viewers the extraordinary conditions in which the soldiers conducted themselves," and "[d]eleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512-13 (2005) (*"Private Ryan"*).

has dramatically increased the risks borne by amici.[3] The new maximum forfeiture means that a single expletive broadcast in a program carried by all 356 PBS member stations could result in a forfeiture of more than $115 million. This amount is nearly a third of the Fiscal Year 2008 federal appropriation for the Corporation for Public Broadcasting's general fund, which provides the federal support for public broadcasting. Corp. for Public Broadcasting, "Appropriation Request & Justification: FY2009 and FY2011" (Feb. 2008), *available at* http://www.cpb.org/aboutcpb/financials/appropriation/justification_09-11.pdf.

The FCC's new policy toward fleeting expletives and its refusal to defer to broadcasters' editorial judgment has forced public broadcasters to edit their programming aggressively, in a way that frequently prevents a full and fair exploration of the topics they portray, in order to avoid the possibility

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[3] Public television amici are faced with similar perils with respect to broadcasts that include nudity. For example, the FCC's new, less restrained indecency policy forced public television stations to consider whether to edit an *Antiques Roadshow* episode including a 50-year-old lithograph of a nude celebrity, even though the episode had previously been broadcast without complaint. Comments of Public Broadcasters on Petitions for Recon., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, FCC File No. EB-03-IH-0110, at 4-5 (May 4, 2004).

The United States Court of Appeals for the Third Circuit recently invalidated an FCC enforcement decision concerning fleeting nudity, holding that, as in this case, the FCC's decision violated the APA. *CBS Corp. v. FCC*, No. 06-3575, 2008 WL 2789307 (3d Cir. Jul. 21, 2008).

of these crippling forfeitures. Examples of this chilling effect and the burdens that the FCC's arbitrary and aggressive enforcement of its indecency policy has imposed include:[4]

- American Experience: Eyes on the Prize. This award-winning documentary series about the Civil Rights era included footage of civil rights activist James Forman addressing a rally and concluding a heated speech by stating, "If we can't sit at the table, let's knock the fucking legs off, excuse me." The series was first broadcast in 1987 with no FCC action and without any complaints about the language. When the series was re-released in 2006, approximately two dozen stations chose to bleep Forman's language.
- American Experience: George H.W. Bush (Bush 41). This documentary about President George H.W. Bush featured a conversation between President Lyndon Johnson and Bush (repeated by the narrator) in which Johnson advises Bush, then a member of the House, that he should run for the Senate because "the difference between being a member of the Senate and a member of the House is the difference between chicken salad and chicken shit." Some stations chose to edit the program because of liability concerns.

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[4] Copies of the programs described herein are available in the archives of amici and will be made available to the Court upon request.

- Enron: The Smartest Guys in the Room. This 2007 documentary, which profiled the rise and fall of Enron, contained a segment featuring phone recordings of Enron energy traders using the expletives "fuck" and "shit," evidencing the atmosphere of arrogance and contempt that was part of the Enron culture. In the wake of the FCC's Notice of Apparent Liability for broadcasting of "The Blues," the film was ultimately distributed with the expletives edited out of the program.

- Extreme Oil. This series, produced by New York station WNET, addressed the United States' challenge in maintaining a stable supply of oil. The "Pipeline" episode included video shot in Baku, Azerbaijan, including an image of graffiti that read "Fuck America." Even though foreign sentiment—intense hostility to the United States—was an important element of the program's message, WNET ultimately cut the image because of uncertainty about the FCC's policy.

- Frontline: The Soldier's Heart. This documentary on U.S. soldiers' difficulties in seeking treatment for post traumatic stress disorder while serving in Iraq included a veterans' advocate stating that a soldier suffering from the disorder was called a "fucking pussy" by his superiors in order to teach other solders that cowardice would not be tolerated. The producer excised the word "fucking" from the program, but Denver station KRMA-TV nevertheless received an FCC Letter of

Inquiry because the broadcast included the word "pussy."

- Marie Antoinette. This documentary on the French Queen included centuries-old political cartoons from the French Revolution depicting the queen engaged in sexual activity, and the reading of a letter written by King Louis' brother, who described the King's sexual dysfunction. Amici expended considerable resources to determine the legal status of the cartoons and the language describing the King's sexual activities in light of the new FCC policy. Although amici were reluctant to edit because of a desire to ensure that persons and events of historical significance were portrayed in an accurate light, some of the cartoons were edited to avoid liability. Despite the editing, some stations declined to air the program.

- Hip Hop: Beyond Beats and Rhymes. This documentary explores misogyny and sexism in modern hip hop music and how lyrics and images in music videos encourage objectification and subjugation of women. In light of the FCC's new indecency policy, many of the hip-hop videos and lyrics criticized in the documentary were edited.

- Operation Homecoming. This documentary explores the experiences of U.S. soldiers serving in Iraq and Afghanistan through their poetry, letters, journals and essays. The soldiers' writing, read as narration, included seven uses of coarse language. Video included images of Saddam Hussein monuments defaced with sexually-themed graffiti and a soldier giving the

middle finger to a mural of Saddam. PBS ultimately distributed the documentary to many stations with the language and images edited out to avoid costs associated with defending the program.

- Wide Angle: 18 With A Bullet. This documentary depicts L.A. gang culture in El Salvador, among Salvadoran nationals deported from the United States. The individuals being portrayed used the word "fuck" and its Spanish equivalent throughout the program. WNET bleeped that language, greatly disrupting the program and undercutting the realism of the program's subject matter.

- The War. This Ken Burns documentary on World War II included a personal account of combat experience by a veteran who used two expletives ("asshole" and "shit"). It also included an episode entitled "FUBAR" that described the terms "FUBAR" ("fucked up beyond all recognition") and "SNAFU" ("situation normal, all fucked up"). Because of concern about the new FCC policy, many stations chose to air an edited version of the program.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the FCC failed to justify a dramatic expansion in the scope of the speech prohibitions it imposes on broadcasters under 18 U.S.C. § 1464, and that the FCC's policy change therefore violated the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Under this Court's precedent, the FCC was

required to "supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). It has failed to do so.

Under the current policy, any use of the word "fuck" or "shit" is presumptively indecent, regardless of whether the words are used to refer to sexual or excretory activity, unless the broadcaster can demonstrate to the satisfaction of the FCC that the language was "necessary" to express a viewpoint or portray a subject. Respondents have explained that the FCC has not offered a reasoned explanation for this standard, which reflects an abandonment of the FCC's policy of restraint, under which it would have exempted isolated use of coarse language and afforded substantial deference to broadcasters' editorial judgment. Moreover, the FCC cannot provide a reasoned explanation for a policy that produces totally arbitrary results. Shifting to a policy that distinguishes between expletives spoken by blues musicians on the one hand and their record producers on the other, or between actors portraying soldiers and actual historic figures, or between news programming and documentary programs, is not supported by a reasoned explanation. And while the FCC has sought to justify abandonment of the fleeting expletives exemption on the ground that context is all important, its policy that the words "fuck" and "shit" always depict sexual or excretory activity rejects context in favor of a categorical rule. For all of these reasons, the FCC's policy change is arbitrary and capricious.

The FCC's new policy is also unconstitutionally overbroad and vague. The policy proscribes far more protected speech than necessary to further any legitimate role the FCC has in regulating indecent content. The policy also is so vague that a reasonable broadcaster cannot determine what speech is prohibited or what considerations will inform the FCC's decision in any future case. Instead, the vagueness of the policy allows the FCC to enforce indecency regulation on an entirely subjective basis.

The FCC's policy shift has imposed substantial costs on amici. In order to avoid calamitous fines that would compromise their ability to continue producing high-quality programming and even threaten their existence, amici are forced to devote substantial time and resources to screening material—including programming previously broadcast without complaints or enforcement action—and to make decisions that compromise their obligation to offer programming that honestly characterizes its subjects. Amici urge the Court to reject the FCC's new policy because of the chilling effect it imposes on constitutionally protected speech.

ARGUMENT

In sanctioning broadcasters for airing programs with content it deems indecent, the FCC engages in content-based regulation of constitutionally protected speech. Recognizing the fine line that the FCC walks in wielding this authority, members of this Court and others have relied on the FCC's exercise of restraint in rejecting

prior challenges to the FCC's indecency policy. In targeting fleeting instances of coarse language and imposing heavy burdens of justification on broadcasters, the FCC has abandoned restraint and crossed the line into arbitrary and unconstitutional agency action. Because the FCC has offered no coherent rationale for its policy change, broadcasters are left to guess what the FCC will find indecent in the next case. The uncertain legal terrain on which broadcasters now stand, together with the ruinous fines that may be imposed for a violation, creates a chilling effect on constitutionally protected speech that the First Amendment cannot tolerate.

I. The FCC's New Indecency Policy is Arbitrary And Capricious Under the APA.

Under the APA, courts will set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the court of appeals held, the FCC's new policy is arbitrary and capricious because the FCC has failed to justify its departure from its longstanding, more restrained approach. As Respondents explain, the FCC violated the APA because it refuses even to acknowledge that it has changed its policy by prohibiting speech falling far short of the "verbal shock treatment" that the Court considered in *Pacifica*, much less to offer a reasoned explanation for the change. *See, e.g.*, Brief for Respondent Fox Television Stations, Inc., at 23. The FCC's policy change also abandons deference to broadcasters' editorial judgment in favor of the subjective views of the Commissioners. Not

surprisingly, that change has produced inconsistent decisions and arbitrary results. This unexplained policy shift also violates the APA.

The FCC's decision in *The Blues* illustrates that the FCC's policy has changed and that the FCC has offered no reasoned explanation for the change. *See State Farm*, 463 U.S. at 42. In *Branton*, the FCC found no violation when ten variants of "fuck" spoken in rapid succession in a recorded statement by John Gotti were broadcast during an NPR news story on organized crime. In its decision, the FCC deferred to "the editorial judgments of broadcast licensees on how best to present serious public affairs programming." *Branton*, 6 F.C.C.R. at 610.

In *The Blues*, the FCC applied no such deference to a documentary, concluding that, even though the "licensee may have been under the good faith belief that the use of these expletives served a legitimate informational purpose," and the words "may have had some communicative purpose," it did not meet its burden of "demonstrat[ing] that [use of the expletives] was essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance." Joint App. 75.

The FCC's decision to abandon its approach of according substantial deference to broadcasters' editorial judgment—and instead to require the broadcaster to convince the FCC that the program was one of the "rare contexts" in which the language was "essential" to the program's message, *id.*—was entirely unsupported. If broadcasting the words of John Gotti was important to conveying a realistic

impression of him and his relationship with his underlings, so too was broadcasting the manner in which blues leaders spoke important to conveying a realistic impression of their industry.

The Blues reflects a departure from *Branton*'s "reluctan[ce] to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming." *Branton*, 6 F.C.C.R. at 610. Although the FCC continues to defer to broadcasters of "news programming," *see Remand Order*, 21 F.C.C.R. at 13327, it has not explained why similar deference does not apply to broadcasters of documentaries, a form of "serious public affairs programming" that was entitled to deference in *Branton*. *Id.*[5]

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[5] The FCC's finding (on remand from the Second Circuit) of no liability for CBS's "The Early Show" broadcast in which a contestant on the CBS program "Survivor: Vanuatu" referred to another contestant as a "bullshitter" illustrates the arbitrariness of deferring only to broadcasters of "news programming." Although the "Early Show" interview of the "Survivor" contestant could have been characterized as "merely promotions for CBS's own entertainment programming," the FCC "defer[red] to CBS's plausible characterization of it's own programming," because "the important First Amendment interests at stake" make it "imperative that we proceed with the utmost restraint when it comes to news programming." *Remand Order*, 21 F.C.C.R. at 13327-28. First Amendment interests are no less important when it comes to "diverse and controversial subjects . . . whether in news and public affairs or in dramatic or other programming contexts." *WGBH Educ. Found.*, 69 F.C.C.2d at ¶ 11. The FCC's application of its indecency policy with less restraint to these other forms of programming is therefore arbitrary and capricious.

The FCC also cannot harmonize its approach to Scorsese's "The Blues" with its recent decision involving another eminent director, Steven Spielberg, and his fictionalized film "Saving Private Ryan." *Private Ryan*, *supra* n.2. Although the FCC found "fuck" and "shit" to be indecent in *The Blues*, it exonerated use of the same words in *Private Ryan* because it concluded that editing "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Private Ryan*, 20 F.C.C.R. at 4512.

The FCC stated that "The Blues" is different from "Saving Private Ryan" because the documentary's educational purpose "could have been fulfilled and all viewpoints expressed without the . . . broadcast of expletives." Joint App. 76. But the disparity between these decisions is unsupported by any coherent rationale. "The Blues" aimed to portray its subject accurately and authentically, while "Saving Private Ryan" was a fictionalized account in which the producers could choose how their characters would speak. If anything, there is a *less* plausible basis to find, as the FCC did, that the expletives spoken by the individuals filmed in "The Blues" were designed to pander, titillate, or shock, where the producer did not choose the expletives but was merely portraying those who did.

The different outcomes illustrate that the FCC's new, less restrained policy lacks "a coherent, principled long-term framework that is rooted in common sense." Joint App. 174 (statement of Comm'r Adelstein concurring in part and dissenting

in part). The FCC's decision to adopt such a policy was arbitrary and capricious.[6]

II. The FCC's New Indecency Policy Is Overbroad.

No area is more sensitive for government than reconciling limited content regulation authorized by Congress, *see* 18 U.S.C. § 1464, with the First Amendment, *see* U.S. Const., amend. I. While Section 1464 prohibits "indecent" language, this Court has "made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'" *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). The FCC thus must tread very carefully in its regulation of indecent

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[6] The FCC's policy change is also arbitrary because it has singled out two words as presumptively indecent while asserting that context is all important. As the court of appeals explained, the notion that the words "fuck" and "shit" invariably refer to sexual or excretory functions "defies any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any 'sexual or excretory' meaning." Pet. App. 29a (quoting *Remand Order* ¶ 23); *see id.* at 29a-30a.

While applying a categorical rule to "fuck" and "shit," the FCC—at least for now—has not placed into that category other similarly coarse words. *See, e.g.*, Joint App. 100 (finding "bullshit," but not "dick" and "dickhead," indecent); *id.* at 138 (finding that "ass" does not "invariably invoke coarse sexual or excretory images" and was not patently offensive in context, because it was used "in a nonsexual sense"). The FCC's categorical approach to "fuck" and "shit" is inconsistent with its purported reliance on context.

speech to avoid violating the First Amendment and the Communication Act's prohibition of censorship. 47 U.S.C. § 326.

For years, the FCC did just that. Thirty years ago in *Pacifica*, two of the five members of the Court's majority rejected the broadcaster's overbreadth challenge on the ground that the policy would not create "an undue 'chilling' effect on broadcasters' exercise of their rights" because "the Commission may be expected to proceed cautiously, as it has in the past." *Pacifica*, 438 U.S. at 761-62 n.4 (Powell, J., joined by Blackmun, J., concurring). Ten years later, the D.C. Circuit in an opinion authored by then-Judge Ruth Bader Ginsburg similarly relied on the FCC's assurance "that it will continue to give weight to reasonable licensee judgments" as a basis for rejecting an overbreadth challenge to the FCC's indecency definition. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) ("[T]he potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

This Court can no longer rely on such assurances. The FCC has adopted a more aggressive indecency policy that reaches fleeting expletives, regardless of whether they actually refer to sexual or excretory activities, *see, e.g.*, *Golden Globe*, 19 F.C.C.R. at 4982, and that places a heavy burden on broadcasters to demonstrate that uses of those words are "essential" to convey a program's message or portray a subject, *see* Joint App. 75-76. As Commissioner Adelstein warned, the FCC has

embarked on a "perilous course" that "is certain to strike fear in the hearts of news and documentary makers, and broadcasters that air them, which could chill the future expression of constitutionally protected speech." *Id.* at 174 (statement of Comm'r Adelstein, concurring in part and dissenting in part). By expanding the scope of its indecency policy beyond the "verbal shock treatment" addressed in *Pacifica* to encompass a greater amount of constitutionally protected speech, the FCC has rendered it fatally overbroad.

A. The FCC's New Policy Prohibits A Substantial Amount Of Protected Speech.

The FCC's new approach to indecency is impermissibly overbroad because it prohibits a "substantial" amount of protected speech, "judged in relation to [its] plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). As amici have explained, *see* Statement Part I(C), *supra*, the FCC's current policy has had a profound chilling effect on their programming by preventing them from airing unedited versions of many programs for fear of massive liability. Examples of censored language that would not have been censored before the policy change include words spoken by a civil rights leader, by a former President of the United States, by gang members, and by a veteran describing his combat experience. *See id.* Amici have also censored documentaries concerning serious social matters including soldiers' writing about their experiences in Iraq and Afghanistan, hostile graffiti

directed at the United States, hip-hop images and lyrics expressing contempt for women, and centuries-old political cartoons depicting Marie Antoinette. *See id.* These examples are representative of a larger body of educational programming in which amici have resorted to self-censorship to avoid FCC action despite their firm belief that the excised material is constitutionally protected. The demonstrable chilling effect of the FCC's new policy on a substantial amount of constitutionally protected speech illustrates that the policy is impermissibly overbroad.

B. The Court Has Construed *Pacifica* "Emphatically Narrow[ly]."

This Court has emphasized the narrowness of *Pacifica*'s holding and underscored the need for caution when the government regulates allegedly indecent speech. In *Sable*, the Court stressed that *Pacifica* was "emphatically narrow" and invalidated a federal statute that imposed a blanket prohibition on indecent interstate commercial telephone messages. *Sable*, 492 U.S. at 126-27.

The Court again limited *Pacifica* in *Reno*, where it invalidated provisions of the Communications Decency Act ("CDA") that criminalized the knowing transmission of indecent messages to minors over the Internet. One of the provisions at issue in *Reno* featured a "contemporary community standard" that is similar to the indecency standard used by the FCC. 521 U.S. at 860, 873.

In *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000), the Court

invalidated as overbroad a statute requiring cable companies to fully scramble sexually oriented programming or limit their transmissions to particular times when children were unlikely be in the audience As the Court explained, "the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." *Id.*[7]

Decisions such as *Sable*, *Reno*, and *Playboy* demonstrate that government regulation of indecency is strongly disfavored under the First Amendment. In upholding the FCC's action concerning the Carlin monologue, the *Pacifica* Court relied on circumstances that in 1978 "narrow[ly]" (438 U.S. at 750) justified a restrained form of broadcast indecency regulation. The "narrowness" (*id.*) of the *Pacifica* ruling and the Court's more recent line of cases invalidating congressional attempts to regulate indecent content cast grave constitutional doubt on the FCC's decision to expand the scope of its indecency policy to reach not only the "verbal shock treatment" at issue in *Pacifica*, but

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[7] The *Playboy* Court further observed, "It is of no moment that the statute does not impose a complete prohibition." but instead channeled content to particular times of the day. 529 U.S. at 812. The Court explained that "[t]he distinction between laws burdening and laws banning speech is but a matter of degree" and that "[t]he Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Id.*

also the "isolated use of a potentially offensive word." *Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring).[8]

Because the FCC's indecency policy today bears little resemblance to the restrained approach that the Court considered in 1978, the *Pacifica* decision does not support the constitutionality of the FCC's changed policy.

C. The FCC's New Policy Is Overbroad Under *Pacifica*.

Pacifica—on which the government so heavily relies—provides an insufficient foundation for the FCC's expanded indecency policy. Justice Powell made clear in his concurring opinion in *Pacifica* that he was relying in part on the FCC's representation that it would "proceed cautiously" in concluding that the policy was not overbroad, *Pacifica*, 438 U.S. at 761-62 n.4 (Powell, J., concurring), and the Court "emphasize[d] the narrowness of [its] holding" (*id.* at 750), which applied to content that was "undisputed[ly]" "vulgar, offensive, and shocking," (*id.* at 747) (internal quotation marks omitted)). *See*

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[8] The FCC has ratcheted up its enforcement while the justification for a government role in regulating indecent content has declined. Under the FCC's rules, viewers of broadcast television can now block individual channels in their entirety, or they may block specific programs on the basis of those programs' content ratings. 47 C.F.R. § 15.120(d)(2). *See also Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 F.C.C.R. 18279, 18347-49 (2004) (requiring digital television receivers with screens 13 inches or greater that are shipped in interstate commerce to be equipped with V-Chip technology).

also Action for Children's Television, 852 F.2d at 1336 (Ginsburg, R.B., J.) (emphasizing that "the FCC consistently reported that it would not essay expansive interpretation of the indecency concept").

The FCC is no longer "proceed[ing] cautiously" when regulating indecency. *The Blues* illustrates how difficult it will be for a broadcaster to justify the use of expletives as "necessary" to a program's message under the new policy. And a comparison of *The Blues* and *Private Ryan* demonstrates the inherent subjectivity of that requirement.

The FCC's expansion of its policy well beyond the restrained approach contemplated in *Pacifica* violates the First Amendment because it deters broadcasters from offering the most authentic version of many educational and cultural programs. *See* pp. 13-16, *supra*. As the Court recognized in *Cohen v. California*, 403 U.S. 15, 26 (1971), "words are often chosen as much for their emotive as their cognitive force." The FCC's policy suppresses their use for that purpose. Bleeping or deleting expletives spoken by documentary interviewees damages the quality of programming, distracts the viewer, and prevents the broadcaster from conveying a realistic portrait of the person, subject, or situation being portrayed.

The FCC cannot justify its new policy by arguing that constitutionally protected indecent content is not prohibited, but merely channeled to times of the day when children are not apt to be in

the audience.[9] This Court rejected a similar contention in *Playboy*, *see* note 7, *supra*, and should do so here as well. The unconstitutional nature of a content-based ban generally cannot be cured by turning it into a time or place restriction. As this Court has explained, regulation of the time when speech may occur "must *not* be based on the content of the message." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 n.3 (2002) (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992)) (emphasis added). If it were otherwise, the First Amendment would not limit meaningfully government regulation of protected speech.

Channeling also fails as a practical matter. Many adult viewers watch television primarily outside the safe-harbor hours. These viewers are thus impermissibly reduced to watching "only what is fit for children." *Reno*, 521 U.S. at 875. The safe-harbor rule is especially burdensome for public television. Airing certain compelling programs only after 10 p.m. could undermine public service because fewer viewers are in the audience at that hour. Indeed, Nielsen Media Research reports that, during the current television season, PBS's average audiences during the 10 p.m. hour were approximately 26% smaller than the comparable audiences between 8 p.m. and 10 p.m. Nielsen Media Research, "Nielsen Galaxy Explorer," Household Ratings By Hour (Sep. 24, 2007 – Jul. 26,

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[9] As a result of litigation, broadcasters may now air programming between 10 p.m. and 6 a.m. without fear of indecency liability. See Pet. App. 148a-149a.

2008). Moreover, it is costly to edit or produce multiple versions of programming, and coordinating distribution uses a substantial amount of amici's limited resources. Regardless of the steps taken by amici, the FCC's new policy deprives many adults of a constitutionally protected viewing experience.

III. The FCC's New Indecency Policy Is Unconstitutionally Vague.

Finally, the FCC's new indecency policy must be invalidated because it is unconstitutionally vague.[10] The FCC's enforcement of Section 1464 violates the Due Process Clause of the Fifth Amendment because it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S.Ct. 1830, 1845 (2008). *See also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).[11]

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[10] In *Action for Children's Television*, then-Judge Ginsburg observed that *Pacifica* "did not address, specifically, whether the FCC's [indecency] definition was on its face unconstitutionally vague." 852 F.2d at 1338. Instead, Judge Ginsburg concluded—while inviting "correction" from this Court—that rejection of such a challenge was "implicit" in the Court's decision. *Id.* at 1339. While upholding the FCC's definition "under governing precedent," Judge Ginsburg found that "vagueness is inherent in [the FCC's definition]." *Id.* at 1344.

[11] Due Process violations are particularly scrutinized when they involve a "criminal statute" like Section 1464. *Pacifica*, 438 U.S. at 739 n.13. Although the *Pacifica* plurality declined to decide the implications of Section 1464's criminal penalties, *id.*,
(...continued)

The FCC has declared that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Golden Globe*, 19 F.C.C.R. at 4980. But it has not provided fair notice of the circumstances in which the fleeting (or repeated) use of expletives *will be found* indecent. The key standard that the FCC has identified—whether the expletives were "essential" to the program—is impermissibly vague because it is inherently subjective. *See Williams*, 128 S. Ct. at 1846 (observing that the Court has invalidated criminal statutes that require an indecency finding because such a standard turns on "wholly subjective judgments").

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the Court generally prohibits multiple interpretations of a statute that applies in both criminal and civil contexts because such an approach would "render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Clark v. Martinez*, 543 U.S. 371, 382 (2005). *See also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Even if the FCC's enforcement scheme could be divorced from the criminal statute it is interpreting, due process principles would still apply because the forfeiture regime in place today is punitive in nature. The increased forfeiture amount is sufficient to put a smaller public broadcaster out of business, and an adjudicated violation of the indecency rules creates the potential for license renewal complications and carries a stigma. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499-500 (1982) (civil statute "quasi-criminal" because of stigma associated with violating it); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) (applying due process protections to civil statute).

The Blues places the vague and subjective nature of the FCC's standard in stark relief. Despite finding that the broadcaster might reasonably have believed that the expletives "served a legitimate informational purpose," Joint App. 78, the FCC held that the broadcaster failed to demonstrate that the expletives were "essential to the nature of [the program]," *id.* at 84. The FCC's decision suggested that the outcome might have been different had the expletives been spoken by blues musicians rather than record producers, but it did not explain this distinction. *Id.* at 73-74.

Just as the broadcaster of "The Blues" could not have foreseen that the FCC would rely on that arbitrary distinction, no broadcaster can predict the rationale that will control the FCC's application of its "necessary" or "essential" test, which requires the Commissioners to substitute their inherently subjective and unpredictable judgment for the editorial discretion of the broadcaster. Although the FCC maintains that its subjective judgments are based on its "collective experience and knowledge, developed through constant interaction with" various parties, *Infinity Radio License, Inc.*, 19 F.C.C.R. 5022, 5026 (2004), the Court has emphasized that "governmental officials cannot make principled distinctions in this area." *Cohen*, 403 U.S. at 25. Broadcasters are therefore at risk of discriminatory enforcement. *See* Joint App. 174 (statement of Comm'r Adelstein) (indecency policy applied in the *Omnibus Order* lacks "a coherent, principled long-term framework").

As this Court has observed, "[t]he vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno*, 521 U.S. at 871-72. This Court's decision in *Reno*, in which it invalidated for vagueness a provision of the CDA that banned the displaying of "patently offensive" material to a minor on the Internet, is instructive. The CDA, like the FCC's indecency policy, prohibited material that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Id.* at 871. The Court observed that "the absence of a definition" of "patently offensive" material would "provoke uncertainty among speakers about . . . just what [it] mean[s]." *Id.* at 872-73. The Court also found it significant that, unlike statutes outlawing obscenity, the statute did not preclude a finding of "patent[] offensive[ness]" if the material possessed "serious literary, artistic, political, or scientific value." *Id.* The Court explained that the "societal value" rule in obscenity cases "critically limits the uncertain sweep of the obscenity definition." *Id.* The absence of such a rule in the CDA meant that there was nothing to mitigate "the vagueness inherent in the open-ended term 'patently offensive,' and thus nothing to prevent the statute from "silenc[ing] some speakers whose messages would be entitled to constitutional protection." *Id.*

The FCC's new policy is impermissibly vague for much the same reasons. Although the FCC has identified three factors that it applies in determining whether material is "patently offensive," vagueness

still permeates the policy. It is unclear how much weight the FCC will accord each of the three factors in any given case, what word will be deemed sufficiently graphic or explicit, whether one word will be sufficient to trigger liability, and whether the word will be deemed "necessary" or "essential." Moreover, like the provision in *Reno*, the FCC's policy does not shield material of "societal value" from liability. In fact, the FCC will not defer to the reasonable judgments of broadcasters of such material, unless it falls into the FCC's "news programming" category.

IV. The FCC Should Apply A Standard More Deferential to Broadcasters' Editorial Judgment.

The FCC's current indecency policy suffers from many fundamental flaws. Amici have focused on the FCC's abandonment of deference to editorial judgment as manifested by its decision in *The Blues*, where the FCC imposed a heavy burden of justification on the broadcaster and thereby overrode its editorial judgment. The utterly subjective nature of the rationale the Commission provided for finding liability there is an object lesson in the peril that attends permitting the government to censor speech.

Under its current approach, the FCC is the sole arbiter of "community standards" and whether a word is "necessary" or "essential" as well. The FCC thereby imposes its subjective views on each of the communities that its broadcast licensees serve, substituting its judgment for that of broadcasters, an approach that chills constitutionally protected

speech and is thus anathema under the First Amendment. Applying a standard that would defer to the good-faith judgments of licensees that serve those communities would be a step towards returning the FCC to the cautious approach upheld in *Pacifica*—one in which the FCC would be "far more dedicated to the First Amendment premise that broadcasters should air controversial programming than . . . worried about an occasional four-letter word." Charles Ferris, Chairman, FCC, Address Before the New England Broad. Ass'n, at 8 (Jul. 21, 1978).

The FCC has adopted a similar deferential standard in another context. In light of the constitutional and statutory prohibitions on "any Commission actions that would improperly interfere with the programming decisions of licensees," 47 U.S.C. § 326; *see* U.S. Const., amend. I, the FCC defers to broadcasters' editorial discretion in the selection and production of news and editorial programming, and it interferes with that discretion only when exercised in bad faith. *See, e.g.*, *John V. Oldfield*, 22 F.C.C.R. 18638, 18642 (2007).

The FCC's deference in this area is based, in part, on the fact that broadcasters are in the best position to understand the needs of their local communities. Moreover, whether they are public stations that depend on individual contributions or commercial broadcasters that must earn advertising revenue, broadcasters have incentives to remain faithful to their audiences and avoid airing programming that would alienate viewers. Indeed, broadcasters have overwhelmingly refrained from

broadcasting explicit content from 10 p.m. to 6 a.m., when the FCC's indecency prohibition does not apply. *See* 47 C.F.R. § 73.3999. There is no reason to believe that, if the FCC adopted a more deferential standard, the character of the programming they broadcast during other hours would change. At the same time, such a standard would help mitigate the current regime's unconstitutional chilling effect on broadcasters' speech.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

AMICI CURIAE IN SUPPORT OF RESPONDENTS

The **Public Broadcasting Service** is a nonprofit membership organization which distributes national public television programming and provides other program-related services to 356 licensees of the nation's public television stations. PBS content reaches more than 65 million people weekly through television and online content.

The **Association of Public Television Stations** is a nonprofit organization whose members comprise the licensees of nearly all of the nation's Corporation for Public Broadcasting-qualified noncommercial educational television stations.

National Public Radio, Inc. is producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves 26 million Americans each week by providing news programming to 285 member station licensees.

Educational Broadcasting Corporation is a producer of public television programming and the licensee of flagship public television station Thirteen/WNET and WLIW 21, serving the New York metropolitan area.

WGBH Educational Foundation is a producer of public television programming and the licensee of public television stations WGBH-TV and WGBX-TV, Boston, Massachusetts, and WGBY-TV,

Springfield, Massachusetts, and four public radio stations in Massachusetts.

San Mateo County Community College District is the licensee of public television station KCSM-TV, San Mateo, California.

Greater Washington Educational Telecommunications Association is a producer of public television programming and the licensee of public television station WETA-TV, Washington, D.C.

Community Television of Southern California is a producer of public television programming and the licensee of public television station KCET, Los Angeles, California.

North Texas Public Broadcasting, Inc. is the licensee of public television station KERA-TV, Dallas, Texas.

Iowa Public Broadcasting Board is the licensee of public television stations KIIN, Iowa City; KSIN-TV, Sioux City; KDIN-TV, Des Moines; KRIN, Waterloo; KBIN-TV, Council Bluffs; KTIN, Fort Dodge; KHIN, Red Oak; KYIN, Mason City and KQIN, Davenport, Iowa.

Rocky Mountain Public Broadcasting Network, Inc. is the licensee of public television stations KRMA-TV, Denver; KTSC, Pueblo; KRMU, Durango; KRMJ, Grand Junction and KRMZ, Steamboat Springs, Colorado.

State of Wisconsin — Educational Communications Board is the licensee of public television stations WHLA-TV, La Crosse; WLEF-TV,

Park Falls; WPNE, Green Bay; WHWC, Menomonie and WHRM-TV, Wausau, Wisconsin.

WQED Multimedia is a producer of public television programming and the licensee of public television station WQED, Pittsburgh, Pennsylvania.

Oregon Public Broadcasting is the licensee of public television stations KOPB-TV, Portland; KOAC-TV, Corvallis; KEPB-TV, Eugene; KTVR-TV, La Grande and KOAB-TV, Bend, Oregon.

WHYY, Inc. is the licensee of public television stations WHYY-TV, Wilmington, and WDPB, Seaford, Delaware.

Twin Cities Public Television, Inc. is the licensee of public television stations KTCA-TV and KTCI-TV, St. Paul/Minneapolis, Minnesota.

Northern California Public Broadcasting, Inc. is the licensee of public television stations KQED, San Francisco; KTEH, San Jose and KQET, Watsonville, California.

KCTS Television is the licensee of public television stations KCTS-TV, Seattle and KYVE, Yakima, Washington.

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*

Petitioners,

v.

FOX TELEVISION STATIONS, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* TIME WARNER INC. IN SUPPORT OF RESPONDENTS

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Pursuant to this Court's Rule 37.2, *amicus curiae* Time Warner Inc. respectfully files this brief in support of respondents.*

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Time Warner Inc. is a leading global media and entertainment company with businesses in cable television networks, cable systems, filmed entertainment, interactive services, and publishing media, including HBO, Turner Broadcasting System, Time Warner Cable, Warner Bros. Entertainment, America Online, and Time Inc. In light of these myriad speech-related endeavors, Time Warner has a substantial interest in cases like this one involving government efforts to restrict speech based on its content.

SUMMARY OF ARGUMENT

Time Warner fully supports respondents' constitutional arguments, which establish that the FCC's new policy on "fleeting expletives" violates the First Amendment as applied to broadcast speech. It follows *a fortiori* that such a policy would violate the First Amendment as applied to speech transmitted by other media, such as cable television, motion pictures, the Internet, or print media. This Court has recognized time and again that the Government

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* Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

may restrict the speech of non-broadcast media based on its content only in the most extraordinary circumstances, and a ban on vulgar or indecent expletives outside the broadcast context could not remotely pass strict First Amendment scrutiny.

The First Amendment, after all, is based on the principle that it is up to the people, not their Government, to make the choices about what speech to hear and not to hear. Whatever limitations on that principle have been recognized in the narrow context of broadcasting do not generally apply in other contexts, and this Court should not lose sight of that bedrock fact in this broadcasting case. Certainly, content-based restrictions on vulgar or indecent speech have no place in the context of cable television. The very strength of the cable medium lies in the remarkable variety of choices that it offers the public. The suggestion by some public officials, echoed by some of petitioners' *amici*, that content-based restrictions on vulgar or indecent speech should not only be upheld in the broadcast context, but extended to the cable context, cannot be squared with settled First Amendment doctrine.

ARGUMENT

The Order Here Cannot Survive Constitutional Scrutiny Because The First Amendment Generally Prohibits The Government From Regulating Speech Based On Its Content.

The Government's merits brief portrays this as a run-of-the-mill administrative law case in which a court overstepped its bounds vis-à-vis an administrative agency. *See* Gov't Br. 20-42. Indeed, the Government tries to sidestep the underlying constitutional issues altogether, and urges this Court

to "remand to allow the Court of Appeals to consider them in the first instance." *Id.* at 42. That attempt to airbrush the constitutional issues out of this case is disingenuous at best.

In a free society, the Government may not lightly restrict speech based on its content. Such restrictions undermine the bedrock First Amendment principle that the people have the right to choose the speech to which they wish to listen or in which they wish to engage, even if others deem that speech vulgar or indecent. *See, e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-27 (2000). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). The "freedom of speech" protected by the First Amendment, U.S. Const. amend. I, thus puts editorial decisions fundamentally in private, not public, hands. *See, e.g., Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). For this reason, "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner*, 512 U.S. at 641.

As this Court has explained, government regulation of indecent speech is "the essence of content-based regulation." *Playboy*, 529 U.S. at 812. Given that "[t]he history of the law of free expression is one of vindication in cases involving speech that

many citizens may find shabby, offensive, or even ugly," speech deemed "vulgar" or "indecent" by some is nonetheless entitled to full First Amendment protection. *Id.* at 826; *see also FCC v. Pacifica Found.*, 438 U.S. 726, 761 (1978) (Powell, J., concurring in part and concurring in the judgment) (rejecting the notion that "indecent" speech is less valuable than other speech, because "[t]his is a judgment for each person to make, not one for the judges to impose upon him").

It is impossible (and unwise) to pretend that these constitutional issues are not implicated by this case. The administrative order under review is not standard agency fare; it is an FCC order that targets speech and only speech based solely on its allegedly indecent content. Indeed, in its petition for certiorari, the Government highlighted the court of appeals' treatment of the underlying constitutional issues. *See* Cert. Pet. 13-30. The very first reason the Government identified for granting the writ was that "the decision below conflicts with this Court's decision in *Pacifica*," *id.* at 16, on the theory that the Second Circuit expressed hostility to a contextual analysis, while *Pacifica* allows such an analysis, as a constitutional matter, *see id.* at 13-14, 15-19. Only after addressing that constitutional issue did the Government move into the standard administrative-law arguments to which it now retreats in its merits brief. *See id.* at 19-26. The Government then argued that the petition was important on the ground that the Second Circuit had placed the FCC in a box by allegedly precluding the agency from considering context on constitutional grounds, and thereby forcing the agency to impose an unconstitutional ban on any and all expletives. *See id.* at 26-30; *see also*

Cert. Reply Br. 2-3 ("[T]his is not an ordinary case. ... [T]he decision below is hardly a garden-variety or routine remand under the ... APA. ... [T]he decision of the court of appeals is predicated on a fundamentally erroneous legal analysis, an analysis that warrants review because it is in direct conflict with this Court's decision in *Pacifica*.") (internal quotation omitted). Having thus urged this Court to grant the petition by emphasizing the Second Circuit's constitutional analysis, the Government may not now suggest that this Court should decide the administrative law issues in a vacuum without regard to the underlying constitutional questions. As one of the Government's own *amici* puts it, the constitutional issues here "prove to be the proverbial 'elephant in the room.'" Br. of *Amicus* Nat'l Religious Broadcasters in Support of Petrs., at 22.

Respondents have well explained the constitutional infirmities in the order under review, and Time Warner will not repeat those arguments here. The point of this brief is to underscore the truly exceptional nature of the FCC's content-based regulation of speech, and to highlight that such regulation cannot pass First Amendment muster either in this case or in the non-broadcast context.

The general rule, as this Court has explained, is that content-based restrictions on protected speech (even if deemed vulgar or indecent) are subject to "strict scrutiny." *Playboy*, 529 U.S. at 814; *see also Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Turner*, 512 U.S. at 642; *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Under that standard, a content-based restriction on speech is presumptively invalid unless the Government establishes that it is

"narrowly tailored to promote a compelling Government interest." *Playboy*, 529 U.S. at 813; *see also id.* at 816. If a less restrictive alternative would serve the Government's purpose, the Government must resort to that alternative. *See id.* at 813. That standard generally applies to all content-based restrictions on speech, regardless of the specific medium of communication. *See, e.g., Playboy*, 529 U.S. at 814 (cable television); *Reno*, 521 U.S. at 874 (Internet); *Sable*, 492 U.S. at 126 (telephone); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (print); *United States v. 12,200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973) (film); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (mails).

The notable exception to that general rule arises in the broadcasting context. Under rationales of spectrum scarcity and public ownership of the airwaves, this Court has allowed the Government far greater latitude to restrict the content of broadcast speech than other speech. *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 394 (1969); *CBS v. DNC*, 412 U.S. 94, 101 (1973); *Pacifica*, 438 U.S. at 748-49; *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 374-76 (1984). Even in the broadcasting context, however, the Government hardly has free rein to restrict speech based on its content; rather, it must "narrowly tailor" restrictions on broadcast speech "to further a substantial governmental interest." *League of Women Voters*, 468 U.S. at 380.

Whatever the merits of continuing to apply less stringent constitutional scrutiny to content-based restrictions on broadcast speech—an issue well beyond the scope of this *amicus* brief—the key point is that broadcasting currently stands alone in the

level of content-based regulation that is constitutionally permissible. Certainly, the Government's greater latitude to restrict broadcast speech provides no basis for restricting non-broadcast speech. Indeed, this Court has specifically rejected the Government's efforts to extend the more relaxed First Amendment scrutiny applicable to broadcast speech to non-broadcast speech, including cable television speech. *See Turner*, 512 U.S. at 637-41. But there is always a danger that reaffirming an analytical framework that allows content-based restrictions on broadcast speech legitimates the entire venture of content-based speech regulation, and emboldens those who seek to expand that venture beyond the broadcast realm.

These concerns are far from idle. In recent years, Congress has entertained a series of bills that would extend the FCC's power to restrict speech based on its content from broadcasting to cable television. *See, e.g.*, Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, S. 616, 109th Cong. (2005); Breaux Amendment to S. 2056, 108th Cong. (2004); Children's Protection from Violent Programming Act, S. 161, 108th Cong. (2003); *see generally* Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended To Cable Television & Satellite Radio?*, 30 S. Ill. L.J. 243, 256 (2006). These indecency measures are "popular with policymakers (if not with the audience members who pay a premium to subscribe to non-broadcast media)," *id.* at 257, and Members of the FCC at various times have expressed an interest in obtaining the authority to regulate the content of cable television speech as well as broadcast television speech, *see, e.g.*, Open Forum on Decency

before the S. Comm. on Commerce, Science and Transportation, 109th Cong. 10 (2005) (statement of FCC Chairman Kevin Martin) ("You can always turn the television off, and of course, block the channels you don't want ... but why should you have to?"); *id.* at 11 ("[B]asic indecency and profanity restrictions may be a viable alternative that should be considered" in the context of cable and satellite television).

To be sure, in an era when many Americans receive their broadcast television stations via cable, it may seem odd at first blush to apply a different First Amendment standard to cable television speech than to broadcast television speech. Indeed, some of the Government's *amici* in this very case take this position. "Under the law, either the home is a special place or it isn't; and if is [*sic*] special, an intruding pig is still an intruding pig regardless of whether it travels by air or wire." Br. of *Amicus* Morality in Media, Inc. in Support of Petrs., at 34.

That approach, however, turns the law upside down. If anything, as respondents explain, technological developments raise doubt that the lesser First Amendment protection historically afforded to broadcast speech is appropriate today. *See* Br. of Resp'ts NBC Universal, Inc. *et al.*, at 32-38; Br. of Resp't Fox Television Stations, Inc., at 43-45. Certainly, such developments do not call into question the robust First Amendment protection afforded to non-broadcast speech. As one commentator has noted, "as blocking technology exists for broadcasting as well [as cable television and subscription media], the better question is whether *Pacifica* is still good law even as applied to

broadcasting, not whether it should be extended to other media." Corn-Revere, *supra*, at 256. This Court should never lose its vigilance to prevent restrictions on broadcast speech from spawning copycat restrictions on non-broadcast speech. *See, e.g., Tornillo*, 418 U.S. at 258 (striking down fairness doctrine, which had been upheld in the broadcast context, as applied to newspapers).

Indeed, the cable television industry has worked closely with community leaders and Congress to adopt voluntary programs to give viewers greater control over what appears on their television screens. More than a decade ago, the entire television industry developed a voluntary ratings system to provide viewers with timely information about the nature of upcoming programming. The FCC approved this voluntary system in 1998, and declined to develop and impose its own alternative system. *See In re Implementation of Section 551 of the Telecomm. Act of 1996 Video Programming Ratings*, 14 F.C.C.R. 8232 (1998). This system now serves as the foundation for the V-Chip, a device found in every 13-inch or larger television manufactured after July 1999, which enables parents "to block the display of violent, sexual, or other programming they believe is harmful to their children." *See In re Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings*, 13 F.C.C.R. 11248 (1998). Cable companies also provide, free of charge, "lock boxes" or alternative methods of blocking the video and audio signals of any channel selected by the customer. *See* 47 U.S.C. § 560. In light of the tools available to allow viewers to choose what cable speech to hear and not to hear, the Government

cannot possibly establish that content-based restrictions on such speech pass First Amendment muster. *See, e.g.*, *Playboy*, 529 U.S. at 815 ("Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.").

Nor does the fact that some have characterized cable television as pervasive, and accessible by children, justify content-based indecency regulation in this context. Books, magazines, and the Internet are also pervasive in our society, and also accessible by children, but that does not justify content-based indecency regulation. *See, e.g.*, *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1169-70 (D. Utah 1982). The Government cannot, in the name of shielding children, abridge the speech of adults by reducing it to a level appropriate for children. *See, e.g.*, *Sable*, 492 U.S. at 128. However well-motivated indecency regulations may be with respect to protecting children, the burden of such regulations on the speech of adults cannot possibly be dismissed as merely "incidental[]." Br. of *Amicus* Morality in Media, Inc., at 36, 37. At issue here are direct content-based restrictions on speech *by* adults *for* adults.

Indeed, the notion that indecency regulations are generally permissible as long as they are motivated by a desire to protect children, *see id.* at 37-38, would essentially render the First Amendment toothless. Legislators, like other human beings, rarely act from a single motive or purpose, and their motivations or purposes are often impossible objectively to discern. A professed desire to protect children from certain

speech may reflect nothing more than an adult's dislike of that speech. Certainly, a professed motivation to protect children cannot possibly create a "safe harbor" for censorship. This Court has never embraced such an approach in two hundred years of this Nation's history, and should not embrace it now.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Respectfully submitted,

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